Petition

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No.

In the Supreme Court of the United States

October Term, 1981

NORTHSIDE REALTY ASSOCIATES, INC.; BARTON & LUDWIG, INC.; HARRY NORMAN & ASSOCIATES, INC.; CLOVER REALTY CO.; EDWIN A. ISAKSON; CHANDLER B. BARTON; and HARRY NORMAN, JR.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1.

Do the following violations of the Jury Selection and Service Act of 1968 constitute a "substantial failure to comply" with the provisions of that Act: (1) intentional disqualification of persons over the age of 70, (2) application of nonstatutory criteria in excluding and excusing hundreds of other persons, (3) failure to have disqualifications and excuses approved by the chief judge, (4) repeated disregard of required procedures for implementing a random selection process despite warnings, and (5) masking of those violations of required procedures by failing to provide public notice of the time and place of implementation of the process despite warnings?

2.

May a "substantial failure to comply" with the provisions of the Jury Selection and Service Act of 1968 be shown solely by substantial departures from the procedures required by the Act, or must actual discriminatory potential or effect also be shown?

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TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Northside Realty Associates, Inc., Barton & Ludwig, Inc., Harry Norman & Associates, Inc., Clover Realty Co., Edwin A. Isakson, Chandler B. Barton, and Harry Norman, Jr., respectfully petition for a writ of certiorari, to the United

States Court of Appeals for the Eleventh Circuit.

OFFICIAL REPORTS

The opinion of former Unit B of the United States Court of Appeals for the Fifth Circuit, of which review is sought, appears at 659 F.2d 590. The opinion of the United States District Court for the Northern District of Georgia, which the Fifth Circuit reversed, appears at 510 F.Supp. 668.

STATEMENT OF JURISDICTION

On October 19, 1981, former Unit B of the United States Court of Appeals for the Fifth Circuit reversed a judgment that had been entered in this case by the United States District Court for the Northern District of Georgia on March 17, 1981. On December 2, 1981, former Unit B of the Fifth Circuit entered an order denying rehearing and rehearing en banc,

and this petition for certiorari is filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES AND JURY PLAN

This case involves portions of the Jury Selection and Service Act of 1968, specifically 28 U.S.C. §§ 1861-63, 1865-67, and 1869(k), and portions of the "Amended Plan Of The United States District Court For The Northern District of Georgia, All Divisions, For the Random Selection Of Grand And Petit Jurors." Because of their length, the relevant portions of the statute and Local Plan are set out in the Appendix.

STATEMENT OF THE CASE

As stated by both the district court and the court of appeals, this case involves "perhaps the most intensive and far reaching challenge of the administration of a federal judicial district jury plan since the adoption of the Jury Selection and Service Act 13 years ago," 510 F.Supp. at 705, 659 F.2d at 609.

The issue which petitioners seek to have reviewed is whether the violations of the Jury Selection and Service Act of 1968, 28 U.S.C. §§1861 et seq. (the "Act"), that were committed constitute a "substantial failure to comply" with the provisions of that Act. The trial and appellate courts agreed that those violations were as follows:

1.

Intentional Disqualification of the Elderly. Notwithstanding the fact

that the Act and the Local Plan offer the elderly the choice of participation in the federal jury system, the jury clerk's office was found to have intentionally and systematically disqualified persons over the age of 70 who had not asked to be excused from service. 510 F.Supp. at 697. The chief jury clerk testified that she disqualified such persons because, in her opinion, their service as jurors "clogs up the works" and "inhibits justice" (Record, Vol. 15, pp. 829-30). Moreover, such persons were disqualified, for example, "if their handwriting was 'shaky' or if they resided in a nursing or retirement home," factors which indicated "mental infirmity" to the jury clerk's office. 510 F.Supp. at 701, n.49. As a result of this intentional

and systematic discrimination, one hundred seventy-eight persons were improperly disqualified. 510 F.Supp. at 697; 659 F.2d at 606 and n.13.

2.

Exclusions Unauthorized By Statute. Another 317 persons were held to have been improperly disqualified because the deputy clerks ignored or disregarded explicit portions of the Act and Local Plan relating to occupations for which excuses could be granted, period of residence requirements, excuses for prior jury service, and permanent-versus-temporary excusals from jury service. 510 F.Supp. at 697-99; 659 F.2d at 606-09. In addition, more than a thousand other disqualifications were challenged, but the district court, 510 F.Supp. at 699, for reasons which were not clear to the court of

appeals, 659 F.2d at 605, did not consider those challenges individually.

3.

Lack Of Judicial Supervision. Throughout the process of qualifying potential jurors, the jury clerk was permitted to make decisions without any meaningful supervision from the chief judge or the clerk of the district court. 510 F.Supp. at 687, 699; 659 F.2d at 608. The chief judge was "seldom consulted" about disqualifications, 510 F.Supp. at 687, notwithstanding the Act's requirement that the ". . . chief judge . . . upon recommendation of the clerk . . . shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for,

exempt, or to be excused from jury service." 28 U.S.C. §1865(a).

4.

Intentional Disregard Of Randomness Procedures. The jury clerk deliberately violated provisions of the Act and Local Plan relating to the computerized selection process, even after the violations were specifically brought to her attention. The jury clerk consistently picked starting numbers for that process usually "out of her head," and occasionally by flipping the pages of a book, with the result that the "starting number choices were not random." 510 F.Supp. at 689, 691; 659 F.2d at 602.

5.

Concealment Of Improper Procedures. The starting number selections were made in such a manner as to deny the

public any practical ability to observe the process, in that the reasonable advance notice of the time and place of selection required by §§1866(a) and 1869(k) of the Act was almost never given, 510 F.Supp. at 688-89; 659 F.2d at 604. The jury clerk persisted in this practice even after "clear warning" was directed to her office by the court of appeals about implementation of the public notice requirement in the Northern District of Georgia. 510 F.Supp. at 694-95. See United States v. Davis, 546 F.2d 583, 589 (5th Cir.), cert. denied, 431 U.S. 906 (1977); United States v. Kennedy, 548 F.2d 608, 612 (5th Cir.), cert. denied, 434 U.S. 865 (1977).

In the face of these facts, the district court concluded that the clerk's errors

were "widespread, consistent and deliberate," were "the result of the application of nonstatutory and nonobjective grounds," and resulted in the displacement of randomness by "private whim." 510 F.Supp. at 700, 701, 705. While stating that it did not "condone" these errors, the court of appeals, reversing the judgment below, held that all the violations proven were not sufficiently substantial to matter, and were in any event harmless because there was no showing of a "discriminatory potential or effect." 659 F.2d at 608-09. That court subsequently denied rehearing and rehearing en banc.

The indictments which the district court dismissed charged the Petitioners with violating Section 1 of the Sherman Act, 15 U.S.C. §1, a federal criminal statute.

ARGUMENT

This case presents "an important question of federal law which has not been, but should be, settled by this Court." Sup.Ct.R. 17.1(c). At issue is the right of all citizens to have the opportunity to be considered for jury service, and of all litigants to indictment and trial by juries selected from among their peers.

The absence of guidance from this Court has resulted in confusion among the lower courts in interpreting the Act. In the fourteen years the Act has now been in effect, this Court has not provided guidance to the lower courts on how the Act is to be construed, or on what Congress meant by "substantial failure to comply." That clarification from this Court is required is best exemplified by the decisions of the two lower courts here. Both courts agreed that violations

had occurred, but each reached widely divergent legal conclusions on why those violations were or were not substantial. These contradictory conclusions resulted from the application of radically different standards of substantiality, and from fundamentally opposed conceptions of how Congress wanted the Act enforced. This case gives the Court the opportunity to establish the appropriate "substantiality" standard and the frame of reference within which that standard should be applied.

More importantly, if the court of appeals' view of the compliance features of the Act is left undisturbed, meaningful enforcement of the Act will be defeated. The court of appeals' disregard of Congress' clearly stated desires, in the face of the egregious and undisputedly established violations, authorizes future neglect of the malady Congress sought to cure.

Finally, the administration of the Act is an important supervisory concern of this Court. Because this Court has the ultimate responsibility for the delivery of justice in the federal courts, it should utilize this occasion to give the lower courts guidance on their responsibilities in the assurance of (1) the opportunity for all to serve as jurors, and (2) the right to indictment and trial by juries randomly and objectively chosen from a cross section of the community. An aspect of the federal judicial system is on trial here, and it is important that this Court take more than the usual care to see that error will not continue to be committed.

An examination of the Act, its legislative history, and the divergent approaches of the courts below will emphasize the importance of these grounds for granting the Petition.

As this Court has often directed, the examination should "begin by looking to the language of the Act." Rubin v. United States, 449 U.S. 424, 429 (1981). Congress established two policy-making sections in the Act, one of which the court of appeals erroneously discarded. The very first section, 28 U.S.C. §1861, announces that it is national policy that all litigants have a right to juries "selected at random from a fair cross section of the community" and that "all citizens have the opportunity to be considered for service . . . and . . . an obligation to serve as jurors . . . ." The second section, 28 U.S.C. §1862, forbids exclusion from jury service "on account of race, color, religion, sex, national origin, or economic status." There is no indication in the language of the statute that the second section was intended to operate as a limitation on

the broader sweep of the first section. On the contrary, the third section of the statute, 28 U.S.C. §1863, directs each district court to create and implement a plan "to achieve the objectives of sections 1861 and 1862 of this title . . . ." (emphasis added). The plain language of the Act thus indicates, as the district court recognized but the court of appeals did not, that the policies of §1861 were of at least equal importance to the policies of §1862.

The legislative history of the Act not only supports this reading of the Act, but suggests that Congress' greater concern was with the goals of §1861. The policy considerations expressed in §1861 are paraphrased very early in the House Report, under the heading "PURPOSE":

> [The Act's] aim is to assure all litigants that potential jurors will be selected at random from a representative cross section of the community and that all qualified citizens will have the oppor-

> tunity to be considered for jury service.

H.R.Rep. No. 1076, 90th Cong., 2d Sess. 3 [hereinafter cited as House Report], reprinted in [1968] U.S. Code Cong. & Ad. News 1792, 1792. Several paragraphs later, under the heading "GENERAL STATEMENT," the same idea is repeated:

> S.989, as amended, embodies two important general principles: (1) random selection of juror names from the voter lists of the district or division in which court is held; and (2) determination of juror disqualifications, excuses, exemptions, and exclusions on the basis of objective criteria only.

House Report at 4, reprinted in [1968] U.S. Code Cong. & Ad. News at 1793. The specific objectives set forth in §1862 are discussed later in the Report, and even then in a manner that suggests that §1862 was included as a corrollary principle to assure that the broader goals of §1861 were carried out specifically with respect to historically protected groups:

> The new section 1862 implements the cross-sectional policy of section 1861 by expressly prohibiting discrimination in the Federal grand and petit jury process.

House Report at 8, reprinted in [1968] U.S. Code Cong. & Ad. News at 1798; S.Rep. No. 891, 90th Cong., 1st Sess. 26 (1967) [hereinafter cited as Senate Report].

Still other legislative history supports the conclusion that Congress made randomness and objective selection criteria ends in themselves, independent of the overlapping goal of defeating overt discrimination of the kind specified in §1862. Congress deliberately left out a provision in the original bill that would have required proof of prejudice caused by a violation of the Act, reasoning that such a requirement "would unduly burden the procedure established by the bill for challenging noncompliance." House

Report at 16, reprinted in [1968] U.S. Code Cong. & Ad. News at 1806. The enforcement features of the bill were accordingly calculated to make determination of substantial compliance as objective and as straightforward as possible:

> . . . The specific and comprehensive nature of the provisions of the act and the local plan will assure that there are readily available standards against which the selection procedures may be measured. Thus, procedural regularity is the measure of the validity of the selection system. It is an appropriate measure since the bill sets up a largely mechanical process in which the role of human discretion is minimized.

House Report at 15, reprinted in [1968] U.S. Code Cong. & Ad. News at 1805; Senate Report at 34 (emphasis added).

In the same vein, Congress rejected an effort to include subjective screening of jurors in the selection process, noting that inclusion of such a procedure would have frustrated what it described

as one of the goals of the statute: "to limit and simplify the challenge process by restricting challenges to those based on procedural grounds." Senate Report at 19.

The district court carried out Congress' intent by testing implementation of the jury selection system in the Northern District of Georgia for the "procedural regularity" of which the House and Senate Reports spoke. Allowing for the inevitability of administrative errors and recognizing that "the rule of reason . . . regards inadvertent, imperfect efforts as insubstantial," the district court nevertheless found that the many violations complained of were so "persistent" and "intentional" that they had "infected" the system with "subjective extra-statutory standards" and allowed the important general

principle of randomness "to be displaced by private whim." 510 F.Supp. at 705.

Congress had indicated that disqualifications, exemptions and excuses were to be "determined only by reference to objective criteria" -- criteria "subject to proof by facts without any substantial possibility of distortion or interpretation of those facts by personal feelings or prejudices," House Report at 13, reprinted in [1968] U.S. Code Cong. & Ad. News at 1803; Senate Report at 31. Yet the clerk had intentionally excluded persons over the age of 70 on the basis of such "personal feelings." Congress had purposefully set forth in detail the kinds of acceptable reasons for disqualification, exemption and excuses, yet the jury clerk's office expanded those categories by excluding hundreds more persons whose names the Act clearly

required to be included in the Qualified Jury Wheel. The Act specifically charged the chief judge with the responsibility of determining, on the jury clerk's recommendation, which persons were to be disqualified, exempted or excused, 28 U.S.C. §1865(a), yet the chief judge was "seldom consulted" on these matters, 510 F.Supp. at 687, with the result that the jury clerk, not any judge, was in fact the final arbiter. The Act and the Local Plan explicitly described the procedures the jury clerk was to follow in implementing the computerized random selection process, yet the jury clerk persisted in disregarding those procedures. The Act and the Local Plan also required the jury clerk to give the public notice of the time and place at which she carried out her part of the implementation process. On two occasions, in United States v. Kennedy,

supra, 548 F.2d at 612, and United States v. Davis, supra, 546 F.2d at 589, the court of appeals expressed its concern about the District's previous failure to give public notice, and its fear that the lack of notice might mask violations. Yet the jury clerk continued to fail to give notice, and it appears that this failure indeed precluded the public from discovering violations that had in fact occurred. The district court rightly concluded that these irregularities constituted substantial departures from the requirements of the Act.

The court of appeals, on the other hand, chose to disregard the character and repetition of these procedural violations, and held that they were not important enough to constitute a "substantial failure to comply" with the provisions of the Act within the meaning of 28 U.S.C. §1867(d). It also observed

that "the purpose of the Act is to prevent discrimination, whether it be on account of 'race, color, religion, sex, national origin, or economic status.'" 659 F.2d at 609, quoting 28 U.S.C. §1862. The appellate court concluded, "Where the procedural errors made by those in charge of selecting juries do not raise the possibility of frustrating this goal, a court should be hesitant to order the drastic remedy of dismissal of indictments." 659 F.2d at 609.

Accordingly, the court of appeals found the starting number/notice violations insubstantial because it was not proven that they "result or have the potential to result in discrimination among cognizable groups of prospective jurors." 659 F.2d at 602. Similarly, with regard to the erroneous excusals, exemptions and disqualifications, the court of appeals refused to find the

violations substantial because, although the exclusions were erroneous, there was no showing of a use of criteria "reflecting either a discriminatory intent or effect." 659 F.2d at 608.

The court of appeals' requirement that a defendant prove actual or potential overt discrimination of the type described in §1862 before being entitled to relief ignores the fact that Congress recognized that such discriminatory impact or intent is often impossible to prove. For just that reason, Congress had rejected a "prejudice" test, as noted above, and had made it clear that the purpose of the Act was to create a "mechanical process" for summoning jurors in which "procedural regularity is the measure of the validity of the selection system." House Report at 15, reprinted in [1968] U.S. Code & Ad. News at 1805; Senate Report at 34.

Proof of overt discrimination, while possibly sufficient for invocation of the Act's remedies, was not intended as an additional burden for the challenging party to carry where significant procedural irregularity could be independently proved.

To allow the court of appeals' ruling to stand, moreover, would be to approve the court of appeals' characterization of egregious and repeated departures from the procedures established by the Act and the Local Plan as insubstantial. Other federal courts, relying on the Fifth Circuit's opinion in a case of this notoriety, are in effect told that the jury clerk or commission may, without penalty, deliberately discriminate against an identifiable group that does not happen to have been included in the §1862 list, 510 F.Supp. at 697, 659 F.2d at 606; rely on nonstatutory and non-Plan

criteria in making disqualifications and excusals, 510 F.Supp. at 697-99, 659 F.2d at 606-09; rule directly on such disqualifications and excusals without approval or supervision from the chief judge, 510 F.Supp. at 687, 699, 659 F.2d at 608; disregard statutory directives and explicit instructions on how to carry out the random selection process, 510 F.Supp. at 691, 659 F.2d at 602; and conduct the improper implementation of that process behind closed doors while representing to supervising and reviewing judges that the public has had access to the process, 510 F.Supp. at 688-89, 659 F.2d at 604.

All these violations surely interfered significantly with the equality of opportunity policy expressed in the first section of the Act, 28 U.S.C. §1861. While there is room for inadvertent error in the selection

process, the violations here were substantial and intentional. These kinds of violations should not be tolerated here or suffered to occur again.

CONCLUSION

The writ of certiorari should be granted because the court of appeals made two mistakes that need to be corrected by this Court. It allowed far too much tolerance for error in its definition of substantiality, particularly in view of the fact that Congress meant for "procedural regularity" to be the readily available test for the validity of system implementation. It also lost sight of the major policy goal of the legislation, equal jury service opportunity and obligation for all citizens, when it focused too narrowly on the secondary goal of the Act, prevention of discrimination against the §1862

groups. In making those errors, the court of appeals created a precedent which, if relied on by counsel and by other courts, will effectively mean a return to the prejudice standard Congress had previously rejected as inadequate. In view of the importance which Congress and the public alike attached to the legislation at issue, in view of the confusion among the lower courts in interpreting the Act, and in view of the fact that this Court has not previously dealt with the issues presented, the writ of certiorari should be granted.

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January 25, 1982

Appendix

A P P E N D I X

NO. _____

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UNITED STATES OF AMERICA

v.

NORTHSIDE REALTY ASSOCIATES, INC. AND BROWNING-FERRIS INDUSTRIES OF GEORGIA, INC., et al.

Nos. CR 80-62A, 80-136A.*

United States District Court,
N.D. Georgia,
Atlanta Division.

March 17, 1981.

MEMORANDUM OPINION

KEADY, Chief Judge, Sitting by Designation.

In this consolidated proceeding the court must deal with motions of various defendants to dismiss indictments on the ground of statutory and constitutional deficiencies in the selection of grand and petit jurors in the Northern District of Georgia.[1] Our present consideration is restricted to procedural issues raised by the government's challenge to the timeliness of defendants' motions under the Jury Selection and Service Act, 28 U.S.C. § 1861 et seq. and Rule 12, F.R.Crim.P.

(a) Real Estate Defendants.

On March 20, 1980, the real estate defendants were indicted on several counts of criminal anti-trust

violations; at arraignment on the following day, they pled not guilty. On July 17, the magistrate assigned to the case entered an order allowing three weeks following receipt of certain materials from the clerk's office for these defendants to file motions to dismiss the grand jury indictment because of alleged substantial departures in the administration of the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 et seq. On August 18, the real estate defendants filed their original motion to dismiss the indictment which charged various deficiencies in the administration of the jury selection plan, to-wit:

1. Erroneous determinations of jury qualifications, exemptions and excuses by individuals delegated authority by the court.

A. Wrongful exclusion of qualified potential jurors by court employees.

B. Unlawful exclusions from grand jury selection process by jury clerk.

C. Alleged effect of actions of court employees and jury clerk on randomness, objectivity and fair cross-section.

2. Statutory violations based on permanent excuses from jury duty.

3. Failure to operate selection mechanism according to the selection plan.

4. Statutory violations based on failure to revise qualified jury wheels.

In addition, defendants raise constitutional claims of race and, later, sex,[2] bias on the part of the district judges in the selection of

grand jury forepersons and deputy forepersons. A second constitutional challenge was based on gender discrimination in the granting of excuses from jury duty. Because of the challenge relating to the selection of forepersons, all sitting district judges in the Northern District of Georgia disqualified themselves, and, upon application of Honorable James P. Coleman, Chief Judge of the United States Court of Appeals for the Fifth Circuit, the undersigned judge was designated to hear all motions to dismiss indictments returned by the district's grand juries.

On November 25 this court, from the judge's home station in Mississippi, issued an order directing that the filing of further amendments, if any were to be made, must be accomplished by December 8. On that date the real

estate defendants, without obtaining leave of court, further amended their motion to dismiss the indictment against them on the constitutional grounds that the plan of selection of grand and petit jurors for the Northern District of Georgia impermissibly results in substantial under-representation of specified cognizable groups of citizens within the community, thus failing to reflect a fair cross section of the citizenry, and that this underrepresentation is further accentuated by failures in the clerk's office to pursue unreturned juror qualification questionnaires for a more accurate determination of the race, sex and economic status of such potential jurors.

It is the position of the real estate defendants that their latest amendment, filed December 8, was merely

supplementary and added little, if any, new material to their previously filed motion to dismiss; or, in the alternative, that constitutional issues raised under Rule 12, F.R.Crim.P., may not be considered waived for failure to file timely. It is the government's contention that our November 25 order may not be properly taken as an invitation to real estate defendants to add new theories to an already wide-ranging challenge for which the defendants have heretofore taken nearly six months to prepare. The government asserts that the latest amendment of the defendants threatens to substantially protract these proceedings because the prosecution would require a significant amount of time to prepare to meet the issues raised in the amendment.

Real estate defendants, in their

latest amendment, challenge the indictment on the following grounds:

A. The voter registration lists of the 46 counties of the Northern District, and four divisions thereof, as source lists from which grand and petit jurors are chosen, the process of selection, and the resulting pool are contrary to the Jury Selection Act and the Constitution of the United States, in that cognizable classes of eligible jurors, i.e., blacks, females, blue collar and service workers, and persons having less than a high school education, are being substantially under-represented in the jury selection process.

B. Eligible jurors are being improperly disqualified or excluded based on place of

residence, in violation of statutory and constitutional law.

C. Insufficient followup is being made by the clerk of court and his deputies as to nonreturned questionnaires, in violation of law.

D. Jurors are not drawn, selected or sworn in accordance with the federal statute and constitution.

E. There is a substantial failure to comply with the provisions of the Jury Selection Act.

F. The indictment in this case was handed down by a grand jury drawn from a jury pool that was not selected in accordance with the statute and the constitution.

G. Trial of defendants on this indictment before a jury drawn

from the existing pool would violate the defendants' rights pursuant to federal statute and the constitution.

The essence of the principal part of the new grounds alleged by the real estate defendants assails the adequacy of voter registration lists as a proper vehicle for providing a fair cross section of the community in the selection of grand and petit jurors; in other respects the amended motion brings forward certain defects alleged to exist in the administration by court personnel of the district's jury plan.

(b) Garbage Case Defendants.

In the companion case, CR 80-136, the prosecution is against the garbage case defendants, who were also indicted on several counts of criminal anti-trust violations. The essential facts of this case follow:

On June 5, 1980, defendants pled not guilty to an indictment which was returned against them on May 29, 1980. Also on June 5, the assigned magistrate imposed a deadline of July 11 for the filing of motions. On July 22 the magistrate conducted a hearing in the garbage case in which a lengthy discussion ensued as to the type and character of the motions which the garbage defendants stated they proposed to file to dismiss their indictment. It was acknowledged by all present, including the magistrate, that the results of the ongoing but uncompleted investigation of the real estate defendants were unknown. The magistrate plainly indicated to defense counsel that he disfavored the filing of any motions to quash on indictment not grounded in fact, but nevertheless allowed defense counsel approximately

two weeks to supplement the record or file further motions. The garbage defendants filed no motion to dismiss the indictment until they first learned of the real estate defendants' motion, which was filed on August 18. That marked the first time that the garbage case defendants became privy to any information derived from the investigation of the real estate defendants. On August 28, the garbage case defendants first filed their motion to dismiss the indictment, urging grounds identical to those advanced by the real estate defendants in their August 18 motion.

Garbage case defendants, first before the magistrate and now before us, urge that it would have been higly disruptive to the clerk's office and its personnel for them to have started an investigation parallel to the one in

progress by the real estate defendants; and they point out that a dual investigation might well have been a needless waste of time and money, depending upon which conclusions were reached in the real estate defendants' investigation. These defendants emphasized the fact that the information begin gathered by the real estate defendants was kept confidential and that their attorneys refused to disclose results of their ongoing investigation. As previously stated, the garbage case defendants, within ten days after first having positive knowledge of the grounds of the real estate defendants' challenge, filed their own motion.

The several grounds of challenge raised by the real estate defendants, and adopted in toto by the garbage case defendants, were based on detailed

in-depth investigation supported by affidavit of Donald Huprich, a law student who was employed by one of the firms representing the real estate defendants. It is evident that the deficiencies set forth in the motions to dismiss relate to subject matter not easily understood, nor likely to be immediately absorbed or comprehended by counsel for the garbage case defendants. As the record reveals, these allegations were made after a three months' investigation of the impanelment process and a review of every juror qualification questionnaire of persons who were deemed ineligible or who were excused by employees of the court.

On September 10 the magistrate ordered a hearing requiring attorneys for the garbage case defendants to show cause why their August 28 filing was

not in violation of the court's timetable for resolution of pretrial matters. At this hearing the magistrate requested additional authority by way of memoranda or letter briefs filed by government and defense counsel from September 10 through October 14. The magistrate never issued a formal ruling,[3] or complied with Rule 12(e).[4]

With matters in this state, counsel for the garbage case defendants and for the real estate defendants commenced to coordinate their efforts. As early as September 24 they met with legal and statistical professionals with a view of employing experts to conduct a compositional study of the grand and petit juries for the entire district. On October 2 an Atlanta-based organization, known as the National Jury Project, was retained to make this

study. On October 14, counsel for defendants moved the magistrate for access to additional records. Although the government's position was that further investigation was unnecessary because of the untimeliness of the garbage case defendants' original motion filed on August 28, the magistrate nevertheless entered an order granting lead defense counsel, as well as specific individuals connected with the National Jury Project, access to additional relevant records in the clerk of court's office. On the day the order was entered, actual research of records commenced, and continued without interruption through October and November. As set forth in the uncontested factual averments in the affidavit of Attorney John R. Martin, data was gathered from the voter registation rolls of the 46 counties

which comprise the judicial district and from the jury-eligible population of each county. This and other information pertinent to a compositional study was assembled to ascertain whether certain groups in the jury-eligible population were overrepresented or underrepresented using a selection plan, as authorized by the judges of the district, based wholly upon voter registration lists within the 46-county area. The garbage case defendants on December 3 filed an amended motion setting forth indentical grounds of constitutional attack raised by the real estate defendants' previously mentioned December 8 motion. Affidavits setting forth facts developed by the compositional study carried out by the National Jury Project were placed on file by lead defense counsel within a matter of days

after the completed data had been delivered to them.[5] Widespread publicity of the jury challenges appeared in the Atlanta newspapers and other media on November 11 and 12, 1980.

ISSUES

The government seeks to dismiss the original and amended motions of the lead defendants on the ground that they were not timely filed within the requirements of 28 U.S.C. § 1867(a),[6] nor were the motions supported by affidavit setting forth facts as required by § 1867(d)[7] which, if true, would constitute a substantial failure to comply with the Jury Selection Act.

A separate and discrete issue is whether the defendants have filed motions which qualify under Rule 12(b)(1) and (2)[8] to raise prior to trial defenses and objections to

defects in the institution of the prosecution or defects in the indictment which had to be filed within time limits provided by subsection (c) of Rule 12.[9] The government contends that the defendants, by their failure to timely file 12(b) motions, have waived grounds of challenge even though they may be of constitutional proportion, and so no basis exists for the court to grant relief from the waiver. The defendants contend that they did not file 12(b) motions out of time but that even if they did, their motions should nevertheless be heard since they raise substantial constitutional issues, the cases are still in a pretrial state, none of the cases having been calendared for trial on the merits, and a hearing on such motions will neither prejudice the government nor frustrate the orderly

calendaring of cases for trial.

We first address the statutory requirements imposed by the Jury Selection Act, particularly 28 U.S.C. § 1867(a) and (d), and next consider the parameters of Rule 12 in the context of constitutional challenges to the jury selection process.

I. JURY SELECTION ACT

The settled law of the Fifth Circuit is that the time provisions of § 1867(a) and (d) must be strictly construed, and that ordinarily failure to challenge the proceedings on the ground of substantial failure to comply with the Act bars a defendant from raising the point. United States v. Merlino, 595 F. 2d 1016, 1020 (5 Cir. 1979), cert. denied, 444 U.S. 1071, 100 S.Ct. 1014, 62 L.Ed.2d 752 (1980); United States v. Kennedy, 548 F. 2d 608, 613 (5 Cir.), cert. denied, 434

U.S. 865, 98 S.Ct. 199, 54 L.Ed.2d 140 (1977); United States v. Hill, 480 F. Supp. 1223, 1227 (S. D. Fla. 1979).

It is to be noted that in Merlino and Kennedy, and in United States v. De Alba-Conrado, 481 F. 2d 1266 (5 Cir. 1973), challenges were first raised at or after voir dire examination. Nevertheless, it is apparent that the Fifth Circuit in Kennedy hinted that unusual circumstances might constitute a reasonable basis for excusing strict compliance with the seven-day rule.

> Absent some indication from particular circumstances that counsel could not reasonably have been expected to comply with the procedural prerequisites to a statutory challenge to the jury, the claim under the Act will be forfeited by noncompliance. (Emphasis added).

Kennedy, at 613. This statement was

alluded to by way of dicta in United States v. Hawkins, 566 F. 2d 1006 (5 Cir.), cert. denied, 439 U.S. 848, 99 S.Ct.150, 58 L.Ed.2d 151 (1978), where the court stated, in reference to Kennedy:

> At the same time, we concluded, based on the express language of the statute, "that Congress left no room for ad hoc review of the usefulness of compliance" with the procedural requirements. Id. Arguably, the statute can be interpreted as impliedly excusing compliance with the timeliness requirement where, as here, a potential irregularity in the jury selection process is known to the trial judge and the prosecutor but is unknown to the defendant.

The district court, in Hill, regarded the expressions of Kennedy as justification for holding "it was never

the intent of Congress to preclude the filing of a motion such as in the instant case . . . , based on these particular [factual matters presented in Hill] circumstances and on the circumstances [presented in Hill] of counsel . . . ." 480 F. Supp. at 1228. Hill adhered to the proposition that the legislative intent of utilizing § 1867 as a means for discouraging spurious challenges filed for dilatory purposes should be recognized. . . . [But] in the instant case . . . the challenge is neither spurious nor the purpose dilatory." Id. The court found further from the particular circumstances presented that counsel could not have reasonably been expected to comply with the procedural prerequisites to the statutory challenge under the Act within the seven-day period and that an exception

of reasonableness was thus imported to the Act. The plain implications of Kennedy and Hawkins convince us that an exception of reasonableness is recognized to allow laxity under certain circumstances as proper to comply with the statutory requirement.

It is to be noted that the Jury Selection Act provides that "[t]he procedures prescribed by [§ 1867] shall be the exclusive means by which a person accused of a Federal crime . . . may challenge any jury on the ground that such jury was not selected in conformity with the provisions of this title." § 1867(e). Notwithstanding the unequivocal provisions of the Jury Selection Act, it is clear that strict compliance with the time provisions of § 1867 is not jurisdictional in the sense that a district court loses power to act upon a challenge not filed

within the seven-day period regardless of the circumstances. We hold that a showing of reasonableness, or exigent or compelling circumstances, authorizes the district court, in the exercise of sound discretion, to entertain a challenge filed out of time.

Since compliance with § 1867(a) and (d) is not jurisdictional in the strict sense of the word although the requirements of timeliness must be stringently observed, courts may, upon an adequate showing of reasonableness, or exigent and compelling circumstances, grant motions filed beyond the seven-day period which raise failure to substantially comply with the Jury Selection Act. With respect to the real estate defendants, it is clear that even prior to indictment and arraignment they engaged investigators to make intensive study of the clerk's

jury records, which entailed examining, and closely inspecting, several thousand juror questionnaires. The magistrate assigned to the real estate defendants' case extended the time for filing of motions to quash their indictment, and their motions were filed within the deadline established. A different situation prevails as to the garbage case and other defendants who made their initial filings alleging substantial departures from the Act on and after August 28. It is evident that prior to August 18 -- ten days before the garbage case defendants filed their motion to dismiss -- all that the garbage case or other defendants could have made would be no more than a paper record, unsupported by factual averment, inasmuch as they had no knowledge regarding the information developed on behalf of the

real estate defendants. Moreover, the circumstances indicate that the garbage case defendants, by withholding possibly unfounded motions, acted reasonably and prudently. Prominently contributing to this conclusion is the fact that the magistrate strongly indicated his disapproval of any motion which might challenge an indictment on the ground of illegalities in grand jury composition unless it was factually supported. The magistrate's position to this effect is clearly reflected in the transcript of his proceeding. An instance of a judicial officer discouraging utilization of a procedure otherwise available to defense counsel, may, we think, be properly regarded as a circumstance sui generis adequately justifying reasonable delay as a prudent course. It is the function of courts not to

ignore realities disclosed by the record, although they may not have occurred with special design or intent to injure but which nevertheless affect counsel in the management of their clients' cases. Suffice it to say that from all circumstances shown, we hold that equitable considerations present here excuse the garbage case defendants from strict compliance with the time requirements of § 1867(a) and (d), and that they acted with reasonable diligence in raising the statutory challenges. Concerning other defendants in the consolidated case, most of whom are represented by the Atlanta Public Defender's office, actual notice of the grand jury challenge was received by this office on September 30, and motions were filed soon thereafter.[10]

II. RULE 12(b) MOTIONS

Initially we judged the December amended motions of all defendants by the stringent time requirements mandated by § 1867 with respect to the filing of motion and supporting affidavit and concluded that all defendants knew or by the exercise of reasonable diligence should have known of the additional grounds of jury challenge at least several months prior to the filing of the December amendments. Therefore, it was our view that the December amendments should be disallowed as untimely under the Jury Selection Act and that Rule 12(b), F.R.Crim.P., did not protect defendants in the late filing of such amendments. Motions to reconsider this aspect of the court's ruling were timely filed and upon reflection, the court adheres to the view that the December amendments to dismiss filed by the

defendants in this case, together with supporting affidavits, did not satisfy the strict requirements of § 1867(a) and (d) and, to that extent, is content to rely upon the reasoning originally stated, i.e., that there was no compelling circumstance or exigent condition which would serve to extend from August 18, or August 28, 1980, to December 1980 the time allowed for the filing of additional grounds of challenge, and, if only statutory grounds were alleged, the December amendments to dismiss would be disallowed.

Nevertheless, the court has reconsidered the applicability of Rule 12(b) to all cases before it and now concludes that the December amendments which raise constitutional claims of serious import that the procedures for selection of grand and petit jurors in

the Northern District of Georgia violate the United States Constitution by failing to provide an adequate cross section of certain cognizable classes of citizens in the community, the claim being that the procedures utilizing the voter registration lists of the several counties comprising the judicial district, result in the under-representation, inter alia, of blacks, blue collar and service workers, and persons having less than a high school education, in the overrepresentation of white collar workers, the employed and persons having a high school education or better, are timely. It is our view that at least to the extent that these claims are of constitutional magnitude, the motions asserting them should be allowed, notwithstanding the lateness of filing. Our ruling in no way alters the trial schedule of the original

motions to dismiss, set for January 5, 1981, and only requires the allowance of the garbage case, real estate and other defendants in the consolidated hearing to participate and rely upon constitutional grounds which have been previously bifurcated by this court from the evidentiary hearing to be presently conducted, and for the bifurcation or reservation of constitutional issues to be determined at a later date.

A brief analysis of the law relating to Rule 12(b) is in order. As originally adopted in 1946, Rule 12(b)(2) provided that defects and objections based on defects in the institution of the prosecution or in the indictment "may be raised only by motion before trial." Subsection (b)(3) provided "the motion shall be made before the plea is entered but the

court may permit it to be made within a reasonable time thereafter." The motion had to include all defenses then available to the defendant, and failure to present an objection constituted waiver thereof, although the court for cause shown could grant relief from the waiver. In 1975, Rule 12(b) was amended to provide specifically that five classes of motion must be raised prior to trial, and defenses and objections based on defects in the institution of the prosecution or in the indictment comprise the first two classes. The amended rule provides in subsection (c) for a motion date, to be determined by local rule or by the court as may be set at time or arraignment or as soon thereafter as may be practicable for the hearing. See notes 8 and 9, supra. The amended rule retains the provision that failure

by a party to raise objections which must be made prior to trial will operate as a waiver if not filed within the time provided by subsection (c), or prior to any extension thereof made by the court, but the court for cause shown may grant relief from the waiver.[11]

It is evident that while any motion attacking the legality of the grand jury composition under amended Rule 12 must be made before trial, the time for filing such motion was somewhat enlarged since it did not have to be filed before the plea or at arraignment but within such time "as soon as practicable" as the court may allow, either initially or by subsequent extension. The purpose of Rule 12 for having pre-trial defenses and objections of this type, even in situations requiring the taking of

evidence, to be disposed of in advance of trial and without frustration of court calendars and inconvenience to jurors, witnesses and lawyers, is adequately served by liberal application of timeliness, especially where constitutional rights of defendants are implicated in the motion. Indeed, from briefs of counsel and our own research, we have found no case which so restricts Rule 12(b) motions in the stringent terms mandated by 28 U.S.C. § 1867(a).

We therefore hold that the strictures imposed by § 1867(a) and (d), as stated in the statute itself to constitute the exclusive method by which defendants in criminal cases may challenge substantial compliance with the Jury Selection Act, relate to those challenges of defects and irregularities which constitute

substantial statutory departures, whether committed by court personnel or by judges in the administration of the jury selection plan or application of the Act, and that § 1867 does not reach or necessarily govern constitutional challenges to the selection of grand and petit jurors. Indeed, to give § 1867 such a broad reading would be to curtail sharply and unduly valued constitutional rights which the decisions of the United States Supreme Court have sought to maintain, short of an unequivocal, unambiguous waiver of right and without the presence of any factual basis for granting relief from waiver of such constitutional claim. The Jury Selection Act, which was adopted March 27, 1968, neither by its terms nor in the legislative history fairly implies that a curtailment of constitutional rights was intended, and

we decline to give § 1867(a) and (d) such a strained interpretation.

There are cases which hold that a challenge to the jury not made until the day of trial comes too late, whether it is treated as a failure to comply with § 1867(a) or with Rule 12. For example, in United States v. Geelan, 509 F. 2d 737 (8 Cir. 1974), cert. denied, 421 U.S. 999, 95 S.Ct. 2395, 44 L.Ed.2d 666 (1975), the Eighth Circuit held a grand jury challenge first made on opening day of trial was disallowed as untimely. It is interesting that the Court nevertheless addressed the merits of the alleged constitutional claim by finding young adults 18-20 years of age do not constitute a cognizable group whose exclusion from the jury rolls amounted to an error of constitutional dimension.[12] Similarly, Brooks v.

United States, 416 F. 2d 1044 (5 Cir. 1969), cert. denied, 400 U.S. 840, 915 S.Ct. 81, 27 L.E.2d 75 (1970), was an appeal from a conviction in the Northern District of Mississippi, in which the Fifth Circuit upheld the trial judge's discretion denying as untimely defense objections made on opening day of trial to quash the indictment and petit jury venire on the ground that the district's jury selection system failed to produce an acceptable number of females for jury service. Then--District Judge Claude Clayton, at arraignment on August 3, advised defense counsel that defendant had 15 days within which to file pretrial motions; no challenge was made until September 25, when the case was called for jury trial. Judge Clayton opined that, considering the length of time since arraignment, the motion was

filed primarily to obtain a continuance.

Many cases, of course, followed the landmark holding in Davis v. United States, 411 U.S. 233, 93 S.Ct. 1577, 36 L.Ed.2d 216 (1973), a decision on which government counsel has strongly relied here. But Davis is readily distinguishable since the defendant Davis made no attack upon the legality of the grand jury which indicted him until he made a motion to vacate sentence under 28 USC § 2255, filed almost three years after his conviction. The Court declared that the "necessary effect of the congressional adoption of Rule 12(b)(2) is to provide that a claim once waived pursuant to that Rule may not later be resurrected, either in the criminal proceedings or in federal habeas, in the absence of the showing of 'cause' which that Rule requires." Davis, at

242, 93 S.Ct. 1582, 83.[13] The Court emphasized that both the trial and appellate courts had positively determined that the issue of discrimination in grand jury selection had not been raised by the defendant prior to trial.[14]

This brings us to whether all defendants in this consolidated hearing have waived the right to raise constitutional challenges contained in their most recent motion. We are still in the pretrial stage, concerned with preliminary matters which attack the procedures used by the court personnel in selecting grand and petit jurors and by judges charged with race and sex bias in the selection of grand jury forepersons and deputy forepersons. No trial date for these cases has been set, and none will have to be continued as a result of these present

proceedings.[15] The grounds of challenge appear to be substantial, and may not be characterized as spurious or interposed merely for purposes of delay.

Other Rule 12(b) considerations should be placed in correct perspective, especially because they are not seriously disputed, if at all, by the prosecution. The garbage case defendants filed their original motion to dismiss on August 28, 1980. Magistrate Forrester held a show-cause hearing on September 10 as to why the filing of the first motion was not in violation of the magistrate's timetable for resolving pretrial matters. Counsel for defendants and the government submitted memoranda and letters directed to this issue through October 14. Meanwhile, counsel for garbage case defendants, on September 24, met with legal and statistical

experts with a view of employing personnel to make a compositional study of the pertinent jury records. On October 2, the real estate defendants, and perhaps other indictees, employed the National Jury Project to make such study. Since the real estate defendants alone had been previously permitted to view the records, Magistrate Forrester was requested, and on October 16 ordered, defense counsel as well as personnel from the National Jury Project to have access to the relevant records. The government never took a firm position of acceding to or opposing this action of the magistrate. The matter first came to our attention in this state of the record.

Although further comment may be unnecessary, we note that several cases have elucidated upon the relief for

"cause" exception in Rule 12. Obviously, it is a matter left to the discretion of the judge. Davis, supra, 411 U.S. at 245, 93 S.Ct. at 1584. Usually, this question has arisen in a post-trial setting. In United States v. Williams, 544 F. 2d 1215 (4 Cir. 1976), the Fourth Circuit ruled that no "cause" was shown by a defendant who had been indicted for first degree murder on a military reservation and was convicted of second degree murder. After the conviction was affirmed on appeal, the defendant filed a § 2255 motion to vacate sentence, alleging for the first time that blacks had been deliberately excluded from the federal grand jury which indicted and the petit jury which convicted him. The district court dismissed summarily, relying on Davis. The appeals court first reversed, stating that the defendant

should have had an opportunity to show "good cause" why he should be excused from Rule 12's waiver provision. The district court, after an evidentiary hearing, held that defendant had not been prejudiced on account of jury composition since there had been black representation on the petit jury and the jury selection procedures were otherwise proper. The Fourth Circuit agreed with this holding, acknowledging that though actual prejudice may be difficult to demonstrate in most cases, it is consistent with the notion that relief from Rule 12(b)(2) waiver is "an exercise of an extraordinary power" and must be regarded as an exception to the rule. Id. at 1218. See Thorgmartin v. United States, 424 F. 2d 630 (5 Cir. 1970).

If it were here necessary to articulate relief from a Rule 12(b)

waiver based on cause, presumed, if not actual, prejudice must be deemed to exist on the basis of facts, which, if shown to be true, would violate established constitutional principles that legally cognizable groups in the jury-eligible population may not be permissibly excluded from the jury selection process. The present defendants are an array of blacks, indigent whites, and other indictees representing wide-ranging economic status. So if their motion to challenge indictments on constitutional issues were disallowed, the effect of such a ruling would leave the defendants, if their positions are not mistaken, without a remedy for the government's violation of constitutional rights. See United States v. Jones, 322 F. Supp. 1110 (E. D. Pa. 1971).

It is accordingly

ORDERED

That except in one case, CR 80-11 N, defendant James Atchley, the government's motions to dismiss the original and amended motions (except the December amendments) of the defendants in this consolidated action which challenge the deficiencies of the selection of grand and petit jurors in the Northern District of Georgia on statutory and constitutional grounds are denied and the government's motion to dismiss Atchley be and the same hereby is sustained.

That the government's motion to dismiss on statutory grounds the amended motions filed in December be and the same hereby is granted, but that, as to the constitutional claims raised in those motions, the government's motion is denied.

That in accordance with rulings made at the pretrial conference, Rule 17.1, F.R.Crim.P., the issues raised by the original motions challenging substantial departures in the application of the Jury Selection Act and the administration of the jury selection plan adopted by the Northern District of Georgia together with the first-raised constitutional claims of racial and sex bias on the part of the sitting judges and the selection of grand jury forepersons and deputy forepersons and gender discrimination in the granting of excuses for jury duty be set for separate hearing in this consolidated action commencing January 5, 1981.

III.

DISPOSITION OF MERITS

In a nine-day evidentiary hearing beginning January 5, 1981, the court

received evidence consisting of voluminous exhibits, live testimony, depositions and heard extended oral argument of counsel. All parties having since presented proposed findings of fact and legal memoranda, the court resolves issues submitted at the present hearing by incorporating herein findings of fact and conclusions of law.

It is helpful to restate the present contentions of the parties. Defendants' most prominent contention is that the sitting district judges of the Northern District of Georgia have impermissibly discriminated against blacks and women in the appointment of grand jury forepersons and deputies from January 1970 through February 1980, contrary to the fifth and sixth amendments to the United States Constitution. In addition to this

constitutional claim, defendants urge that the indictments against them should be dismissed because of a variety of irregularities or failures resulting in substantial noncompliance with the Jury Selection and Service Act, as well as the district's plan for the selection and service of grand and petit jurors which was adopted by the district judges and approved by the Reviewing Panel of the Fifth Circuit. The prosecution's response, initially, is that the offices of grand jury foreperson and deputy in the federal prosecution system have no constitutional significance; but if this position is not well taken, it is claimed that defendants failed to make out a prima facie case of race or sex discrimination; and finally that any prima facie case of such discrimination was effectively rebutted by affirmative

and unimpeached evidence offered by the prosecution. As for claims based upon alleged noncompliance with the statute and the district's plan pertaining to the selection and service of grand and petit jurors, the government argues that court personnel substantially complied with jury selection process mandated by law in all material respects and that the few deviations disclosed by the evidence were minor, only technical in nature, and of de minimus effect, considering the size and scope of the tasks imposed upon a large judicial district and the demonstrated diligence and good faith exhibited by court personnel in administering the plan.

We shall briefly set forth the essential, yet largely uncontradicted, evidence regarding the constitutional claim of the foreperson issue before

entering into a detailed discussion of the evidence and law concerning the challenges of noncompliance which defendants make based upon the Act and the district's plan.

(a) The grand jury foreperson constitutional claim.

The Northern District of Georgia, comprising 46 counties, has four statutorily created divisions: Atlanta, Gainesville, Newnan and Rome. Grand juries are regularly convened at Atlanta; each grand jury ordinarily serves for 18 months, and there is usually more than one grand jury sitting at any particular time. Veniremen, or panel members, are proportionately drawn from the separate qualified wheels at the four divisions. Prior to July 1974, 36 persons -- 20 from the Atlanta Division, 8 from the Rome Division, and

4 each from the Gainesville and Newnan Divisions -- were customarily summoned for grand jury duty. Thereafter, the number of veniremen was increased to 50 -- 33 persons are chosen from the Atlanta Division, 4 from Gainesville, 5 from Newnan and 8 from Rome.

During the relevant time period, 42 different grand juries for the district were empaneled, each consisting, as provided by law, of no more than 23 members. During this entire period, 43 foreperson appointments were made.[16] The duty of appointing forepersons and deputies was rotated among eight then sitting judges.[17] Of the 43 forepersons selected, only two were black.[18] Two white females were selected foreperson by Judge Freeman. Regarding deputies, there were three black females and 13 white females.[19]

The record shows that the aggregate

composition of all empaneled grand juries from January 1970 to February 1980 consisted of a total of 948 jurors, of whom 514 (54%) were white males, 288 (30%) were white females, 68 (7%) were black females and 49 (5%) were black males.[20] As regards the composition by sex, 579 (61%) were males and 369 (39%) were females. As for race, 802 (85%) were white, 117 (12%) were black and 29 (3%) were of unknown race.[21]

Defendants offered James Michael O'Reilly, an expert social scientist, who testified that he ascertained the jury-eligible population (18 and over) for the 46 counties in the Northern District of Georgia based on the 1970 United States Census, which he adjusted by 1978 Georgia estimates, arriving at a jury-eligible population of 1,409,200 whites and 312,047 blacks. He stated

it was recognized by census and other population authorities that the 1970 United States official census, on a nation-wide basis, undercounted whites by 1.9% and blacks by 7.7%. Applying these national rates of undercount to each race, O'Reilly calculated that in 1978 the judicial district had a white jury-eligible population of 1,439,642 and a black jury-eligible population of 340,464 (19.1%). Using the same formula, O'Reilly ascertained for the Atlanta Division alone a white jury-eligible population of 942,258 and a black jury-eligible population of 269,896 (22.3%).[22] O'Reilly compared the percentage of blacks and whites in the jury-eligible population for the entire district with the percentage of blacks and whites appointed as forepersons. Blacks represented only 4.7% of total foreperson selections (2

blacks out of 43 forepersons). Compared to the 19.1% district black population, O'Reilly determined an absolute disparity of 14.4% and a comparative disparity of 75.7%. Use of chi square (X^2) formula yielded .016, which means that there was one chance out of 63 that black underrepresentation as forepersons was the result of chance, and hence black under-representation as forepersons was due to some factor other than chance. With respect to sex, O'Reilly compared the district female population (51.2%) with the percentage of female forepersons (4.7%), being 2 females out of 43, and calculated this to be an absolute disparity of 46.5% and a comparative disparity of 90.9%. From a statistical viewpoint, O'Reilly testified that the odds of so few females serving as forepersons as a matter of chance were

approximately 1 in 900 million. No calculations were made by O'Reilly as to the blacks and women who were appointed as deputies.[23]

O'Reilly's statistical calculations were essentially unimpeached by Dr. Charles Wang, the prosecution's expert, who criticized O'Reilly's statistical methodology yet did not take serious issue with O'Reilly's conclusions.

Defendants also offered "theoretical evidence" through Dr. John McConahay, of Duke University, who testified as to group dynamics. His opinion was that though the influence of a leader of a group of less than ten may be minimal, as the size of the group increases, the influence of the leader is also likely to increase. McConahay drew a distinction between an "imposed leader," i.e., one appointed from an outside source, and the "emergent

leader," i.e., one who naturally assumes a position of leadership within the group. This expert's opinion was that the influence of an imposed leader, as one appointed by a judge to be grand jury foreperson, is apt to be greater than that of other members of the grand jury. Since the foreperson might be perceived as having more expertise if chosen by the judge, he opined that a judge-appointed foreperson would likely exercise considerable influence over the grand jury's deliberations. This expert expressed no opinion as to the role of the deputy foreperson, other than that the position called for less of a leadership role. On cross-examination, McConahay acknowledged that the longer and more frequently the same group meets, the greater is the chance that a natural leader, which he termed a

"socio-emotional leader," might emerge with lessening influence of the appointed leader. He readily conceded that under such circumstances an appointed foreperson might well have less influence over a period of time. This witness acknowledged that he had never served on a federal grand jury, had no knowledge of how often a particular grand jury might meet or how long it remains in session, and knew nothing of the manner in which it transacts business.

The defense offered United States District Judge Vining, who was allowed to express his views based upon six years' experience as district attorney in the Georgia state courts in dealing with state grand juries which selected their own forepersons in accordance with Georgia law.[24] Judge Vining's observations as to the operation of

state grand jurors, selected from a single county, were objected to by the prosecution; the court overruled this objection and admitted the judge's testimony as a lay opinion under Rule 701 helpful to the court sitting as the trier of fact. Judge Vining, who had observed 40 state grand juries in operation, expressed the view that the foreperson should be a strong person who is not arbitrary yet mindful of the responsibility for directing the session. He characterized the foreperson as a "vital cog" in the grand jury "to avoid it going off in different directions." On cross-examination, the judge stated that Georgia grand juries drawn from a single county serve for two- and six-month periods. While he ordinarily withdrew from the grand jury room during the deliberations on an

indictment, many district attorneys remain throughout. His experience was that the foreperson of a grand jury did not ordinarily cast a vote in indictments but he usually saw that the business was handled with dispatch. For example, Judge Vining recalled one grand jury, in a four-day session, returning 300 indictments.

All eight appointing judges testified that in selection of forepersons and deputies they examined and relied upon the juror questionnaires of persons summoned for grand jury duty, and they made no independent investigation of their qualifications. Except in rare instances, the appointing judge did not personally know the individuals he selected as forepersons and deputies. The essence of the judges' testimony was that in making selections they were guided chiefly by one's education and

character of employment, and that they endeavored to select forepersons and deputies who had apparent qualifications to serve in those capacities. All of the judges categorically denied that considerations of sex or race entered into their selection, and that they particularly did not discriminate against blacks or women in their appointments. Practically all of the judges expressed the view that the foreperson should be one who had the capacity to conduct and preside over meetings of the grand jury, and able to perform duties largely of an administrative character. On cross-examination most judges conceded that persons on the grand juries other than the individuals they chose as forepersons and deputies might have been as well qualified as the

forepersons and deputies who were appointed.

The foregoing summary of the evidence is adequate to demonstrate that the issue of sex and race discrimination in the selection of forepersons and deputies is indeed a question of major constitutional import, provided the office of a federal grand jury foreperson has constitutional significance.[25]

It is a well-settled principle that courts should not decide a case on constitutional grounds when it can be resolved on statutory and general law grounds. This doctrine was emphasized in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347, 56 S.Ct. 566, 483, 80 L.Ed. 688 (1936), which stated:

> The Court will not pass upon a constitutional question although

> properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. Siler v. Louisville & Nashville R. Co., 213 U. S. 175, 191 [29 S.Ct. 451, 454, 53 L.Ed. 753]; Light v. United States, 220 U. S. 523, 538 [31 S.Ct. 485, 488, 55 L.Ed. 570].

Id. 297 U.S. at 347, 56 S.Ct. at 483. (Brandeis, J., concurring, joined by Justices Stone, Roberts and Cardozo).

The Supreme Court has unswervingly held to this approach in resolving issues based upon both constitutional

and statutory grounds. The rule was recently reaffirmed in Califano v. Yamasaki, 442 U.S. 682, 692, 97 S.Ct. 2545, 2553, 61 L.Ed. 2d 176, 187 (1979), when the Secretary of the Department of Health, Education, and Welfare (HEW), as petitioner, sought to recoup erroneous overpayment made to social security beneficiaries. The recipients sued in federal court on claims that the Secretary's recoupment procedures were contrary to the recoupment statute, 42 U.S.C. § 404, and the Due Process Clause of the fifth amendment. Holding that the case was capable of resolution on statutory grounds, Justice Blackmun, writing for the Court, pretermitted consideration of the Due Process claim by stating:

> A court presented with both statutory and constitutional grounds to support the relief requested

usually should pass on the statutory claim before considering the constitutional question. New York City Transit Authority v. Beazer, 440 U.S. 568, 582-583, and n. 22, 99 S.Ct. 1355 [1364 n.22], 59 L.Ed.2d 587 (1979); United States v. CIO, 335 U.S. 106, 110, 68 S.Ct. 1349 [1351], 92 L.Ed. 1849 (1948); Ashwander v. TVA, 297 U.S. 288, 347, 56 S.Ct. 466 [483] 80 L. Ed. 688 (1936) (concurring opinion).

Id. 442 U.S. at 692, 99 S.Ct. at 2553.

Since it is our view that the instant cases may be disposed of on grounds based upon the Jury Selection and Services Act, the district's judicially approved plan, and general law principles, we find it inappropriate to address the constitutional claims that the positions of forepersons and deputy forepersons of federal grand juries

have constitutional significance where such grand juries are selected and drawn strictly in accordance with the statute and the district's plan. Similarly, we pretermit defendants' alternative constitutional claims that persons over 70 years of age are a "cognizable group," whose exclusion offends the Constitution and that optional excusals of females, and not males, having legal custody of children under 10 years of age amount to unconstitutional gender discrimination.

(b) Failure to comply with the Jury Selection and Service Act and the District Court's approved Plan.

Our analysis begins with the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 et seq., which was enacted to effectuate definite policies clearly expressed within the Act itself:

> It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community and in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the districts courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

28 U.S.C. § 1861. The Act's legislative history amplifies this policy:

> The purpose of [the Act] is to provide improved judicial machinery for the selection of Federal grand

> and petit jurors. Its aim is to assure to all litigants that potential jurors will be selected at random from a representative cross section of the community and that all qualified citizens will have the opportunity to be considered for jury service.

S. Rep. No. 891, 90th Cong., 2nd Sess. 9, reprinted in [1968] U. S. Code Cong. & Ad. News 1792, 1792.

In order to achieve the cross-sectionality objective, the Act embodies two important general principles:

> (1) random selection of juror names from the voter lists of the district or division in which court is held; and (2) determination of juror disqualifications, excuses, exemptions, and exclusions on the basis of objective criteria only.

> These principles provide the best method for obtaining jury lists that represent a cross section of the relevant community and for establishing an effective bulwark against impermissible forms of discrimination and arbitrariness.

Id. at 1793. Random selection "virtually eliminates the possibility of impermissible discrimination and arbitrariness at all stages of the jury selection process, and thereby tends to insure that the jury list will be drawn from a cross section of the community," while the "objectivity principle" was intended to prohibit the then "widespread current practice of imposing qualifications above and beyond those specified by Congress." Id. at 1794 and 1795.

The Act expressly contemplates that in many respects each district court

bears the responsibility of devising and placing into operation a written plan for random selection of grand and petit jurors to be drawn from a fair cross section of the community.

We therefore conclude that a violation of the district's Local Plan constitutes a violation of the Act if the Local Plan's provision not adhered to effectuates one of the two paramount purposes of the Act. See United States V. Tarnowski, 429 F. Supp. 783, 790 (E. D. Mich. 1977), aff'd, 583 F. 2d 903 (6 Cir. 1978), cert. denied, 440 U.S. 918, 99 S.Ct. 1238, 59 L.Ed.2d 468 (1979).

A remedy is not provided for every violation of the Act or Plan. Rather:

> Congress recognizing that there would undoubtedly be error in the jury selection process that should not result in the dismissal of an indictment, left room for harmless

> error by providing that dismissal should lie only when there was a substantial failure to comply with the Act.

United States V. Evans, 526 F. 2d 701, 705 (5 Cir.) (emphasis original), cert. denied, 429 U.S. 818, 97 S.Ct. 62, 50 L.Ed.2d 78 (1976). The Fifth Circuit has made clear that a determination of whether there has been substantial compliance with the Act "requires that the alleged violations of the Act be weighed against the goals of the statute." United States v. Smith, 588 F. 2d 111, 115 n.22 (5 Cir. 1979); United States v. Carter, 568 F. 2d 453, 455 (5 Cir. 1978); United States v. Davis, 546 F. 2d 583, 589 (5 Cir.), cert. denied, 431 U.S. 906, 97 S.Ct. 1701, 52 L.Ed.2d 391 (1977). Thus, "[o]therwise technical violations of the statute constitute 'substantial

failure to comply' when they affect the random nature or objectivity of the selection process." United States v. Kennedy, 548 F. 2d 608, 612 (5 Cir.), cert. denied, 434 U.S. 865, 98 S.Ct. 199, 54 L.Ed.2d 140 (1977).

Once substantial noncompliance with the Act or Plan has been established, "the court [must] stay the proceedings pending the selection of a grand jury in conformity with this title or dismiss the indictments, whichever is appropriate." 28 U.S.C. § 1867(d). Furthermore, staying the proceedings or dismissing the indictments is "the exclusive means by which a person accused of a Federal crime . . . may challenge any jury on the ground that such jury was not selected in conformity with [the Act]." Id. § 1867(e).

With these principles in mind, we

turn to the specific issues of the statutory and plan challenges raised by defendants in the administration of the jury selection process in the Northern Districts of Georgia.

Jury selection challenges in the Northern District of Georgia are not strangers to the Fifth Circuit. United States v. Davis, supra; United States v. Kennedy, supra. In both cases, the Fifth Circuit was critical of the District's failure to comply with 28 USC § 1861 et seq., as well as the Local Plan adopted pursuant to the Act. A detailed discussion of the historical implementation utilizing computers may be found in Davis, and is reiterated here only to the extent necessary to understand this opinion.

Challenges Based on Randomness: Starting Number and Public Notice

During orientation on the new

automated jury selection system in 1975, the General Services Administration (GSA) instructed the clerk's office on how to work in conjunction with the system's computer. Pursuant to the Act and the Local Plan, the district's procedure utilizes voter registration lists from each county within the district. The GSA program automatically selects names from computer tapes furnished by Georgia counties that themselves utilize automated systems. For those counties that rely on printed or written lists, the clerk's office is responsible for "red-lining" or checking names to be placed in the master wheel. Names are selected to assure proportionate divisional representation in the master wheel. The GSA then creates a master wheel computer tape in which the entire array of names is alphabetized and each

name given a number. The tape also retains divisional identity for each name. The GSA and the clerk's office properly performed these selections from voter registration lists to master wheel.

In mid-1976, work began on the construction of four new qualified wheels, one for each division in the district. The GSA computer was utilized to address standard Juror Qualification Questionnaires, on a form approved by the Administrative Office of the United States, to each of the 59,352 persons whose names were contained on the four master jury wheels. The questionnaires were in turn mailed, with instructions to the addressees that they be completed, signed, dated, and returned to the clerk's office. Approximately 42,000 questionnaires were returned to the

clerk's office as directed. Upon receipt, the returned questionnaires were screened by the jury clerk, Angela Turner, and two or three assistants to determine whether, under the requirements of the Plan and the Act, they should be included or excluded from the respective qualified wheels. Turner and her assistants performed the qualifying task after being instructed by the clerk of the court Ben H. Carter, as to the proper bases for excusal, exemption, and disqualification under the Plan and Act. Carter was thereafter consulted only when specific questions concerning a particular individual arose. Then-Chief Judge Henderson was seldom consulted during the screening process, which took approximately six months. Of the 42,105 returned questionnaires, 11,875 were either disqualified, excluded,

exempted or excused; the remaining 30,230 were qualified by the clerk's office. When a prospective juror was qualified, this fact was noted on a computer-punched card that was returned to GSA, which fed the information from card to computer for recording on the master wheel tape. Thus, the qualified wheel consists of prospective jurors marked "qualified" on the master wheel computer tape; there is no separate tape or computer printout made up of only qualified jurors.

When the court requires a panel of qualified jurors, whether grand or petit, it sends an order to the clerk's office. For grand juries the clerk draws a proportionate number of potential jurors from each division. A grand jury panel usually numbers 50, of which 33 are picked from the Atlanta qualified wheel, 8 from the Rome

qualified wheel, 5 from Newnan and 4 from Gainesville.

However, before the panel may be chosen, an "increment" or "quotient" number must be calculated for each division. An increment equals the number of qualified jurors remaining in a division's qualified wheel divided by the number of jurors needed from that division. For example, if the Atlanta Division retains 18,000 qualified names, the increment would be 18,000 - 33, or 545.[26] The jury clerk must then, at random, draw a "starting" number within the range of one to the increment number, inclusive. For each division the clerk fills out a "transmittal" form, which includes both starting and increment numbers, for delivery to the computer. Because the Northern District of Georgia contains four divisions, the jury clerk must

forward four transmittal sheets for each grand jury panel.

The GSA picks, as the first name from each divisional wheel, the prospective juror whose position in the qualified wheel corresponds to the starting number picked by the clerk's office. Thereafter the computer selects each qualified juror whose position falls one increment number farther down the list from the previous qualified prospective juror selected. For example, choosing from the Atlanta Division, with an increment number of 545 and a starting number of 123, the persons in the qualified wheel at positions, 123, 668, 1213, and so on until the thirty-third person was chosen would constitute the portion of the grand jury panel drawn from the Atlanta Division's qualified wheel.

Each person whose name is selected

from the computer is mailed a summons for service. Juror information cards are completed by the summoned individual, who is instructed to inform promptly the court if he or she has a reason for being unable to serve. Many people are excused by the jury clerk prior to reporting. When such an excuse is granted, the computer center is notified so that it may enter the information on the computer tape.[27] Persons permanently excused are removed from the qualified wheel. Those whose service is deferred are supposed to remain in the qualified wheel, along with information concerning when they may subsequently serve. For later juror orders, the selection process is designed to go first through deferred names and pick those who may then serve.

Before choosing the starting number, the clerk's office is required to post

public notice of the event. Afterwards, notice of the starting number selected is to be posted. Since 1971, Angela Turner, the jury clerk who continues to serve under Ben H. Carter, the current clerk of court, has been in charge of this procedure as well as the qualification process. Turner rarely complied with the first notice requirement.[28] In fact, for almost every drawing at issue, both notices were posted simultaneously, after the starting number had been drawn. On one or two occasions, when pressed for time, the clerk's office posted no notice at all. On the infrequent occasions when notices were posted before drawing the starting number, the number was selected no more than a few hours later. Sometimes selection of the starting number took place right away -- as soon as the jury clerk could

return to the clerk's office to perform the drawing. A few times Turner posted notices in her office behind her desk. She continued these practices despite contrary instructions by Carter, after previous challenges to the district's jury selection procedures.

Even now, public notice is given for no more than a brief period of time prior to starting number selection. Notices are posted as soon as Turner receives an order for a jury from a judge, but she draws the starting number in her office the same day. The interval between posting and drawing varies but usually extends only from one to two hours. The jury clerk posts notices on the twenty-second floor of the federal building on a bulletin board located to one side of the elevators, away from the public desk of the clerk's office.[29] In sum, we

find as a fact that notice of starting number drawings has been, and remains, insufficient to give the public adequate notice. Violation of this requirement occurred practically without exception prior to the filing of these motions and continues to this day by the unreasonably brief time between the notice and the drawing of the starting number.

Although the Local Plan mandates use of "a drum or box containing numbered cards covering the same range of numbers as the 'quotient'" to draw the starting number, see Local Plan at 90a, Turner and her assistants rarely followed it. In 1975, when the district commenced using the computerized jury selection system, Turner picked starting numbers by holding the beginning pages of a dictionary from page one to the

increment number, then flipping the book open for a "random" number. She testified that she tried to vary from left to right within the pages held but admitted that she had a tendency to keep away from the end pages.

In 1976, Carter gave Turner a wheel and told her to use it instead of the "book" method. Nevertheless, Turner rarely resorted to the wheel because it did not contain the proper number of cards, i.e., from one to the increment number, whatever it might be at a particular drawing. Instead, being pressed for time, she began to use her own method to obtain starting numbers. The so-called "Turner" method entailed picking a number out of her head which, she testified was always within the increment number. Although Turner denied that she had any favorite number, she did favor her own method

over the "book," wheel, or any other method.

Turner sometimes asked her assistant, Allen Newman, for a starting number rather than select one herself. Newman was responsible for 15 to 20 of the starting number selections. He testified that Turner would ask him for a number between one and 100, irrespective of what might be the range of the increment number. However, at least after 1978, when the jury selection procedures of the district were previously challenged, Newman used the wheel when the increment number was less than the number of cards the wheel contained. At other times the assistant used his own variation of the "book" method by placing the dictionary on its back and letting it fall open. When necessary, he would continue this procedure until he obtained a number

within the increment range.

Newman also testified, and Carter confirmed, that Carter directed Turner to use the wheel exclusively. Nonetheless, the jury clerk failed to change the number of cards in the wheel to match the increment range for each individual selection. Instead, Turner continued to do most of the selections according to her own methods. It took another warning by Carter, precipitated by the filing of the present motions, for Turner to commence using the wheel without exception and to select from the wheel starting numbers by use of discs, numbered from one to the increment number.

According to undisputed evidence, the jury clerk picked 92 starting numbers for grand and petit jury selections from the Atanta Division qualified wheel during the period March 3, 1977,

through April 9, 1980. Of these 92, six numbers accounted for 29 choices, or 32% of the 92. These numbers and their frequencies were: 69 - 5; 76 - 5; 77 - 3; 78 - 6; 88 - 4; 89 - 6. Another statistic reveals that the numbers 50 through 90, inclusive, accounted for 39 of the 92 choices, or 42%. Also, although increments ranged as high as 557, the highest starting number ever picked was 288, and the second highest was 201. On the basis of these numbers alone, Dr. Wang, the government's expert applied mathematician, stated that he could not conclude whether or not these starting numbers had been randomly chosen. However, he did say that no one can pick a "random" number out of his head.

From March 8, 1978, to January 3, 1980, the jury clerk chose 59 total staring numbers for Atlanta Division

petit juries and the Atlanta Division's portion of grand juries.[30] Calculated as percentages of the highest possible increment number during this period (557), the proof shows that only one starting number (1.7% of the 59 starting numbers) fell within the highest quartile (25%) of the increment range. The 10 grand jury starting numbers chosen for the Atlanta Division over this period were within the range of 8% to 40% of the highest possible increment number. Dr. Wang admitted that these starting numbers were relatively low considering the range of possible increment numbers. He concluded, and we find as a fact, that the data showed starting numbers for these 10 grand jury selections were not randomly chosen. Since Turner was responsible for selecting starting numbers in the Gainesville, Newnan, and

Rome Divisions, she caused most, if not all, of such selections of starting numbers to be similarly made in a nonrandom manner.

Dr. Wang was of the firm opinion that despite these non-random starting numbers, over the passage of time the likelihood that a particular juror would be chosen was approximately equal to that of any other person in the qualified wheel.[31] He characterized Turner's methods as nonrandom processes that nevertheless culminated in random results since Dr. Wang's analysis showed that "over a period of time," the actual starting number selected becomes irrelevant to the probability of any particular prospective juror being picked. He based his conclusion on the observation that increments are different for each selection because the qualified wheel constantly

dwindles; because petit and grand juries requiring different panel sizes are drawn from the same list and therefore alter the relative order of jurors remaining in the wheel; and because the "set over" of unused petit jurors to another petit jury contributes to differing increment numbers. He therefore was of the opinion that the increment number and not the starting number is the key to randomness. This expert concluded that in view of these variables, the starting number over a period of time has little, if any, effect on the chance of any person in the qualified wheel being chosen as a venireman.[32]

The importance of random selection of starting numbers stems from the fact that given a list of persons in the qualified wheel and records of selections to date, it would be

possible for the jury clerk to include one or perhaps more than one qualified individual in a particular grand or petit jury. The possibility of such an act may be no more than theoretical. Although the necessary records, in the form of computer punched cards, are maintained in the clerk's office, their sheer numbers would render this task extremely difficult and time-consuming. In any case, there is neither evidence nor even an allegation that Turner or anyone else attempted to manipulate the system with this purpose in mind. Nevertheless, one cannot rule out the possibility for abuse in defeating random jury selection.

Since we find as a fact that the jury clerk's starting number choices were not random, the selection process did not result in random panel choices for individual grand juries. For grand

juries viewed one at a time, the chances for qualified wheel members to be picked were certainly not substantially equal. Although, as Dr. Wang testified, the starting number becomes immaterial after the passage of an indeterminate period of time, there is no way of knowing what duration of time is required to produce this inadvertent result of randomness. Moreover, the evidence does not show simply a single departure from the plan's requirement for selecting a starting number. On the contrary, nonrandom methods of selecting starting numbers were regularly employed in drawing grand and petit jurors many times over a period of several years.

Defendants contend that their indictments should be dismissed because the clerk's office has transgressed the requirements of random selection of

starting numbers, as well as public notice of starting number drawings. That the Act and the Plan were violated by the use of nonrandom methods to select starting numbers and by the failure to post adequate notice is indisputable. The question we must determine is whether these deviations constitute substantial failure to comply with the Act and Plan. These violations, defendants urge, per se constitute substantial failure to comply with Act and Plan, warranting dismissal of the indictments.

The government responds that "substantiality" must be measured by its effects on randomness. The government reasons that "over the passage of time," starting number selections result in randomly chosen grand jury panels because both petit and grand jurors are constantly drawn

from the qualified wheel and are not replaced, thus altering their relative positions within the qualified wheel (the "nonreplacement factor," as termed by Dr. Wang). The government maintains no material consequences have flowed from nonrandom selection of starting numbers, making this violation of the Act and Plan merely technical. In addition, the prosecution urges such lack of notice did not affect ultimate randomness and that this deviation from the Act and Plan should also be regarded as minimal and insubstantial.

The Fifth Circuit has expounded on the issue of randomness in United States v. Kennedy, supra, and United States v. Smith, supra. In Kennedy, a case from the Northern District of Georgia, the jury clerk faced a shortage of prospective jurors during the July term of court. Instead of

supplementing the number of July prospects available in the qualified jury wheel, the jury clerk solicited volunteers from jurors who had served during the June term. Three volunteers remained on Kennedy's panel when Kennedy's counsel, just prior to voir dire, orally subjected on the basis of the "random selection rule." 548 F. 2d at 610.

On appeal, the Fifth Circuit found that this method violated the Act in two respects. First, a list of the prior term's jurors did not constitute an alternative source list within the meaning of 28 U.S.C. § 1866(f), [33] which delineates options for summoning petit jurors when the court faces an unanticipated shortage of them. More important, assuming § 1866(f) permitted use of the June term's jurors from which to make emergency selections, the

jury clerk, by asking for volunteers, did not select panel members from that list at random, required by § 1866(f). As the court said, "[i]t seems self-evident that allowing people to decide whether they wish to perform a particular task is quite the opposite of randomly selecting those who, unless within narrow and objectively determined categories of exemptions and excuses, must perform the task. A volunteer is not a random selectee." 548 F. 2d at 611 (citation omitted).

The Fifth Circuit concluded that this failure to comply with the Act was substantial, the court reasoning that

> [o]therwise technical violations of the statute constitute "substantial failure to comply" when they affect the random nature or objectivity of the selection process.

. . . . .

We need not speculate as to what sort of biases will be reflected in a jury chosen on the basis of its members' willingness to depart from their daily business and serve as jurors. It is enough to recognize that a substantial variable, not contemplated by the Act's few, narrow categories of qualifications, exemptions, and excuses, has confounded the selection process.

. . . . .

A litigant need not show prejudice to establish a "substantial failure to comply" with the Act. Congress deleted just such a requirement from the bill presented to the conference committee. . . . Moreover, when a statutory violation directly affects the random nature of the selection process, there is no need to show that the violation tended to exclude

> some cognizable group from that process. Congress did not simply outlaw certain disparities in representation of certain groups on juries; it designed a procedure of random selection to ensure that no such disparities would arise. A departure from the statutory scheme that directly affects the random nature of selection establishes a substantial violation independently of the departure's consequences in a particular case. (Emphasis added).

Id. at 612 (citations omitted) (emphasis added). The conviction was nevertheless upheld because of the failure of defense counsel to properly raise the issue.[34]

Though Kennedy's pronouncements on violations of the Act vis-a-vis substantiality are obiter dicta, they remain the most extensive Fifth Circuit

discourse on the subject and are given added weight by the fact that they were cited with approval in United States v. Smith, supra. Smith considered whether supplementing a qualified wheel by returning to it "names of persons who had served more than two years previously and those who had been called but for some reason did not serve" amounted to a substantial violation of the Act. Id. at 113. It was contended that the clerk's office contravened § 1866(f),[35] because a method not listed in that section was employed to obtain emergency jurors.

After first construing § 1866(f) as merely directory, the Firth Circuit inquired whether other subsections of § 1866 prohibited the challenged practice:

> In examining other subsections of § 1866, we find that (c), which states that persons excluded on

> certain grounds may sit on other juries, contemplates that many persons who have been called but have not served may be called again. Moreover, subsection (e), which prohibits requiring any person to serve more than 30 days within any two year period, recognizes that some jurors may serve more than once in four years. The fact that a person is called a little over two years after prior jury service does not, in and of itself, violate the statute. And since the inherent random nature of the selection process is not significantly affected by such an occurrence, we find that the actions appellants complain of did not frustrate the purpose of the Act.

Id. at 114-15 (citations omitted). In a footnote to the quoted paragraph, the court stated that this practice did not

significantly affect the inherent random nature of the selection process because "[t]he panels are still selected at random from a large group of names. The procedure used here would never produce a jury like that the Court condemned in United States v. Kennedy." Id. at 115 n. 21. The court thus concluded that the clerk's actions were not prohibited by statute and that in any case, the slightly greater likelihood and opportunity of some persons in the qualified wheel to be selected more than once did not constitute substantial noncompliance.

Although neither Smith nor Kennedy is factually in point, they do stand for the proposition that violations of the Act or Plan in drawing starting numbers, to be actionable, need not necessarily manifest themselves in some resulting harm, and that transgressions

must be evaluated in the light of the purposes of the Act. To determine whether these nonrandom procedures constitute a "substantial failure to comply," we must decide how important they are toward accomplishing the goals of the Act. When deviations from the Act are important, they can only be characterized as "substantial." The Plan itself emphasizes the importance of the random selection of the starting number as follows:

> The 'starting number' is a number drawn by lot from a drum box containing consecutively numbered cards covering the same range of numbers as the 'quotient.' . . .
>
> Randomly drawing a 'starting number' by lot accomplishes three objectives:
>
> --it establishes the location on

> the voter name list(s), or wheel, from which the first name is taken;
> --it removes the possibility of human discretion or choice in selection of any individual's name (making individual name selections unpredictable and unpredeterminable), and
> --it insures that, at the outset of the drawing, mathematical odds of being picked are substantially equal for all names in the source from which drawn.

Local Rules, at 90a (emphasis added).

Under the facts of this case, it is appropriate to examine not only the methods used for selecting starting numbers, but the manner of providing public notice as well. Under 28 U.S.C. § 1866(a), "the clerk shall publicly draw at random from the qualified jury wheel such number of names of persons

as may be required for assignment to grand and petit jury panels." "Publicly draw" is defined by § 1869(k) to mean "a drawing which is conducted within the district after reasonable public notice and which is open to the public at large." Under the district's plan, "[r]andom drawings of starting numbers shall be publicly made . . . at times to be publicly announced on the Court bulletin board." Local Plan at 90b.

Few cases deal with the discrete issue of public notice at any stage of the jury selection process.[36] An approach to the problem of public notice arose in United States v. Dalton, 465 F. 2d 32 (5 Cir.), cert. denied, 409 U.S. 1062, 34 L.Ed.2d 515 (1972). In Dalton, the defendant challenged selection of the grand jury that indicted him on the ground that

the drawing was not in a public place but in a room in the clerk's office attended only by clerk personnel, yet open to the public. The Fifth Circuit stated briefly: "There is no merit in [defendant's] contention . . . . This was not an invalid procedure." 465 F. 2d at 34. The case was cited with approval in Davis.[37]

As in the case sub judice, Davis originated in the Northern District of Georgia. The primary question in Davis was whether lack of public access to jury selections from qualified wheel made by computer amounted to substantial violation of the Plan. The computer, operated by the GSA in Atlanta, was as a rule closed to contact from the public because of the necessity for physical security, the special atmospheric conditions necessary to computer functioning, and

space limitations. Id. at 588. Noting that, by the time the case reached the court of appeals, public access to drawings was being freely granted and would continue, the Fifth Circuit ruled that "the lack of public access to the automated drawings did not amount to 'substantial failure to comply' with the Act." Id. at 589. The court stated that lack of public access to drawings of names from the computer amounted to a mere technical violation and did not affect the "random nature and objectivity of the selection process." Id. Of special significance to the instant cases is the following observation of the court:

> If we were left in the dark about the procedures employed behind closed doors, or if we had reason to believe that there were any improprieties which had escaped detection as a

> result of non-public drawings, the result might be different. In such a case, of course, the concern would be not with the procedures themselves but rather with their effect on the random nature and objectivity of the selection.

Id. Thus, according to the rationale of the Fifth Circuit in both Dalton and Davis, lack of public access to the grand jury selection process constitutes a substantial violation of the Act if it masks deviations from its requirements.

Both Dalton and Davis involved challenges based on inaccessibility of the public to the jury selection process, while here we are concerned not with the place of the drawing or the accessibility of the public to that place but, rather, with the adequacy of the notice of the drawing given. A

public drawing is, of course, meaningless unless the public is notified reasonably in advance of the time and place of the drawing. This much is recognized by the Act's definition of "publicly draw" under § 1869(k). We conclude that if notices of starting-number drawings are not reasonably adequate for the public to make use of the information contained in them, and in fact starting-number drawings did not comply with the requirements of Act and Plan such that they affected "the random nature and objectivity of the selection," then a substantial violation of Act and Plan has occurred.

We do not think that infrequent, simple, inadvertent deviations in random selection of starting numbers and adequacy of public notice should constitute a substantial failure to

comply with the Act or the Plan and result in harsh consequences of dismissal of indictments. That a standard of perfection in achieving randomness was not contemplated by Congress is clear from the legislative history.[38] Nevertheless, deviations which cease to be inadvertent or infrequent and become the rule by which the jury selection process is administered offend the expressed goals of the Act and the carefully devised district plan to the extent that we are compelled to provide a remedy which will assure the cessation of such offensive practices. Indeed, it must be pointed out that the Northern District of Georgia has twice had clear warning that its jury selection practices were likely in substantial violation of the Act and Plan.

Davis practically compels this

conclusion. Davis was decided in part on the assumption that the clerk's office had commenced to post proper notices of drawings and would continue to do so, the court stating:

> Public announcement of both the drawing of the starting number in the clerk's office and the automated drawing of the names at the computer center is required by the local plan. Notices to that effect are now posted in advance of the drawings.

546 F. 2d at 588 n. 17 (emphasis added).

Unlike the Fifth Circuit in Davis, we are not "left in the dark about the procedures employed behind closed doors," and we know that "improprieties"[39] took place in the form of nonrandom drawings. Id. Davis' warning to the clerk's office went unheeded for, as we have found, inadequate notice continues even at

this date. We resist the temptation merely to warn the clerk's office, as the Davis court did without resulting change.

Moreover, the clerk's office was cautioned a second time by the Fifth Circuit in Kennedy, decided only some two months after Davis. The Court of Appeals condemned the practice of soliciting "volunteer" jurors, concluding that this substantially violated the Act. Although the court ruled against the defendant, it warned the clerk's office that "had appellant properly preserved his objection to the practice, he would clearly have been entitled to relief." 548 F. 2d at 612 (emphasis added). The clerk's office should have comprehended that it must follow the Plan by picking starting numbers by lot from a box or drum. Yet the jury clerk continued her nonrandom

drawings despite warnings from the clerk of court to cease.

We are at a loss to understand why after two rebukes from the Fifth Circuit the clerk's office has continued to fail to comply with the express requirements of Act and Plan. That it has continued to do so highlights the need for adequate public notice to insure starting numbers were randomly selected in accordance with the Act and the Plan, and the public and litigants must have an opportunity to observe this process to insure that these abuses which have been the subject of judicial comment are no longer continued. We therefore find substantial violations of the Act and Plan have occurred by the regular utilization over an extended period of time of nonrandom selections of starting numbers, together with the

persistent failure over a significant period of time to post the required notices.

Challenges Based on Objectivity: Exclusion Based on Disqualifications, Exemptions, and Excusals.[40]

Of the 11,875 juror questionnaires which the jury clerks determined to be disqualified, exempt, or excused, and therefore excluded from the qualified jury wheels, defendants challenge that 1537 were erroneously excluded under the Act or Plan. To address the substantiality of this claim, the court has had to assume the tedious task of reviewing all of the questionnaires in issue. As previously stated, it is undisputed that the review of returned questionnaires for determination of excusals, exemptions, and disqualifications was performed largely by Turner, the jury clerk, and two or

three assistants. The clerk of court apparently felt that he had gained familiarity with the requirements of the Plan in filling the 1973 master and qualified wheels by working closely with then-Chief Judge Sidney Smith concerning screening of the juror questionnaires. During the 1977 qualification process and as new qualified wheels were constructed, however, Carter, under then-Chief Judge Henderson, seldom, if ever, sought screening advice and contemporaneous approval of the Chief Judge or any other district judge. During this period, Carter was only occasionally consulted by jury clerks when they were unsure of whether a particular person should be excused, exempted, or disqualified.

Our analysis of the challenged questionnaires reveals exclusions from

the qualified wheels which deviate from the Plan and Act in the following particulars:

1. Erroneous "Age" Excusals. The Plan provides that "all persons over 70 years of age at time of executing the jury qualification form" may be excused upon individual request. Local Plan at 88. Defendants maintain that "over 70 years of age" means at least "71." We disagree with this construction. In our minds, "over 70" means "70 + one second." Therefore, we find that excusals of persons 70 years or over, when requested, were properly granted. Nonetheless, the clerk's office incorrectly excused at least 188 individuals on the basis of this category. Forty-three persons were excused before they had reached the age of 70 "at time of executing the jury qualification form." More serious,

however, is the fact that 135 prospective jurors 70 or over were excluded from the qualified wheel even though they did not request excusal.[41] The government attempted to downplay the significance of these figures by introducing questionnaires of persons age 70 or over who were included in the qualified wheels.[42] However, the court is concerned here only with violations of either the Plan or the Act, and not with whether all persons over age 70 were excluded from service. The fact that more persons were excluded on account of age than were included in the qualified wheels[43] is important at this juncture because it indicates that these erroneous excusals were the result of a misunderstanding by the clerk personnel that persons over 70 were to be excused regardless of

request and not the result of pure administrative mistakes. They were nonetheless purposely, and not inadvertently, excluded from the qualified wheel. That this practice was intentional is obvious from the fact that the jury clerks circled in red the ages of persons 70 or more.

2. Erroneous Disqualifications Based on Intradistrict Moves. Both the Act and the Plan provide that a person is qualified for jury service only if, inter alia, he "has resided for a period of one year within the judicial district." Plan at 89; 28 U.S.C. § 1865(b)(1). Although neither the Plan nor the Act disqualify individuals from service if they have not lived within a certain division of the court for one year, the clerk's office excluded at least 159 individuals because of interdivisional moves (both within and

outside of one year prior to completion of the questionnaire) when these persons had resided within the district for one year prior to executing the questionnaire.[44] The clerks understood this procedure to be mandated by the Plan since it provides that "names of grand and petit jurors serving on or after the effective date of this plan shall be selected at random from voter registration lists of all the counties in the relevant division." Local Plan at 85 (emphasis added). The clerks thought that the underscored language required that an individual reside in the same division at the time of executing the questionnaire as that in which his name was drawn from the voter registration list. We disagree.

The Plan and Act provide for disqualification only if the

prospective juror has not resided within the district for a period of one year. The voter registration lists provide the source for filling the master wheel; it is nowhere required that an individual be qualified to vote in the same division in which he resides, so long as his name was drawn from the voter registration list. We see no reason for disqualifying a person only because of an interdivisional but intradistrict change of residence. There is nothing in either the Act or the Plan to support the government's position in this respect. Any doubt must be resolved in favor of inclusion, not exclusion. Furthermore, the only reported decision on this topic fully supports our view that these exclusions were wrongful. In United States v. Rosenthal, 482 F. Supp. 867, 873 (M. D.

Ga. 1979), the court, faced with precise issue, summarily concluded:

> The one year residence requirement for jurors is not unconstitutional. See e.g., United States v. Perry, 480 F. 2d 147 (5th Cir. 1973). Nor does the fact that the clerk may have disqualified someone who had resided within the district for one year but who had moved to another location within the district within one year, require dismissal of the indictment. The small number of persons within this category is too insubstantial to possibly amount to a violation of the statute or constitution.

Thus, while the court found that disqualifications based on intradistrict moves violates the Act, it held that the violation, based on the number of persons affected, was not a substantial one.[45] We therefore

conclude that the 184 persons disqualified on the basis of intradistrict changes in residence were improperly excluded from the qualified wheel.

3. Erroneous Excusals and Exemptions Based Upon Occupation. The Plan grants an optional excuse to "all ministers of the gospel and members of religious orders actively so engaged" and "all actively practicing attorneys, physicians, dentists, and registered nurses." Local Plan at 87-88. Furthermore, the following persons are exempt from service, and therefore automatically excluded from the qualified wheel regardless of request:

(1) member in active service of the armed forces of the United States;

(2) members of the Fire or Police Departments of any State, District, Territory, Possession of subdivision

> thereof; (3) public officers in the executive, legislative or judicial branches of the government of the United States or any State, District, Territory, or Possession or subdivision thereof who are actively engaged in the performance of official duties (public officer shall mean a person who is either elected to public office or who is directly appointed by a person elected to public office).

Id. at 88. Our review of the challenged questionnaire indicates that at least 72 persons were wrongfully excluded from the qualified wheel by reason of their occupation. The majority of these persons are registered nurses who did not request an excuse on that basis. The fact that these exclusions were intentional and not merely inadvertent is evidenced by

the fact that in many instances the jury clerk underlined in red, for example, "registered nurse" on the questionnaire even though the prospective juror did not request an excuse on that basis.

4. Erroneous Excusals on the Basis of Having Previously Served on a Grand or Petit Jury. The Plan grants an optional excuse to "any person who has served as a grand or petit juror in a federal court during the past two years immediately preceding his call to serve." Id. at 88 (emphasis added). The clerk's office excused at least 61 persons on this ground although these individuals indicated that they had served on such a jury within two years of the date of completing the questionnaire or had served only on a state or county jury. Since the Plan grants an excuse to the individual only

if he served two years "immediately preceding his call to serve," these individuals should have been placed in the qualified wheel. Since the life of the qualified wheel is four years, the excuse of prior federal jury service would have expired for many persons at the time they would have been called to serve. Also, excusing persons who had served only on a state jury is contrary to the Plan. Furthermore, it is apparent that these exclusions were deliberate, and not merely inadvertent. Had the clear provisions of the Plan been followed, these errors would not have been made.[46]

5. Other Exclusions Alleged to be Erroneous. Defendants also maintain that numerous other prospective jurors were excluded improperly from the qualified wheel by the clerk's office, largely because of insufficient medical

documentation indicating the person was incapable of rendering satisfactory jury service. Since the medical disqualification, unlike the other grounds for exclusion previously discussed, allows some room for discretion on the part of the excusing official, we hesitate to substitute our subjective judgment for that of the clerk's office in many of these instances and find it unnecessary to do so.[47]

The government contends that since the percentage of challenged questionnaires to mailed questionnaires is extremely small, defendants cannot establish substantial violations of the Act or Plan on grounds of objectivity. Our analysis of the applicable case law, however, compels us to conclude that a substantial statutory violation is presented when significant numbers

of excusals, exemptions, and disqualifications have been wrongfully granted by jury personnel based on extra-statutory or -plan considerations, especially when these actions are taken without the contemporaneous approval of a district court judge.

Section 1865(a), which was adopted in the Plan, provides in part as follows:

> The chief judge of the district court, or such other district court judge as the Plan may provide, on his initiative or upon recommendation of the clerk or jury commission, shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for, or exempt, or to be excused from jury service.

Thus, although a clerk may screen questionnaires and make recommendations

to a district judge concerning exclusions from service, it is clear that § 1865 and the Plan contemplate active participation of a district court judge. It is no less clear that § 1865 requires that only competent evidence be used as a basis for disqualification, exception or excusal. The purpose of this requirement "is to prevent a disqualification from being made on the basis of subjective considerations, such as the unsupported opinion of the clerk or other such evidence that is not verifiable independently of personal feelings." [1968] U. S. Code Cong. & Ad. News 1792, at 1803.

Several cases have discussed the question of whether usurpation of judicial functions by a jury clerk constitutes a substantial violation of the Act. In United States v. Evans,

supra, the court was faced with the question of whether wrongful inclusion of names in the qualified wheel by jury clerks constitutes a basis for dismissal of defendants' indictments. The court emphasized the fact that the actions of the clerks resulted in improper inclusions of individuals rather than exclusions. 526 F. 2d at 705-07. In finding no substantial violation occurred, the court noted that there was no showing that "in determining juror qualifications the clerks applied any non-objective criteria in violation of [the objectivity principle]." Id. at 706. Furthermore, the evidence did not establish that the clerks

> applied only extra-statutory, subjective criteria in the screening process. Rather, the clerks determined juror qualifications

> solely on the basis of the criteria specified in the Act and without a discriminatory result. While some technical errors were made, the fact that clerks, rather than a judge, made these determinations does not necessitate reversal.

The court emphasized that

> [t]he overwhelming majority of the errors alleged to have been committed by clerks in the screening process appear to have resulted not in the discriminatory exclusion from jury service against which the Act was intended to safeguard, but rather in the inclusion of persons who perhaps should have been relieved of jury duty. There may have been isolated examples of mistaken exclusion, but these alone do not afford a valid basis for challenging the grand jury.

Id. (emphasis in original) (footnote

omitted). Since defendants in that case failed to show that anyone was excluded from service on the basis of extra-statutory, subjective criteria, there was no substantial violation of the Act. Id. at 706-07. Thus, in Evans there was apparently no evidence of widespread, consistent and deliberate exclusion of persons from the qualified wheel as there is in the case sub judice.

The determination of excusals, exemptions and disqualifications of potential jurors by jury clerks was again discussed in United States v. Huber, 457 F. Supp. 1221 (S.D.N.Y. 1978). In that case, however, there was apparently no evidence that persons were being wrongfully excluded from the qualified wheel by the clerks.[48] Huber, therefore, stands only for the proposition that delegation of judicial

functions to the jury clerk is not per se a substantial violation of the Act.

In United States v. Jenison, supra, the court found that the Act was violated since "prospective grand jurors were occasionally excused by jury section clerks without contemporaneous approval by a district court judge." Id. at 667. Notwithstanding violation, however, the court refused to dismiss the indictments because the excusals did not tend to frustrate the policies of the Act. In this regard, the court stated:

> The evidence does not establish that the Southern District clerks applied subjective criteria in excusing or disqualifying prospective jurors. As in Evans, "the clerks determined juror qualifications solely on the basis of the criteria specified in

> the Act and without a discriminatory result." Id. at 706. This court concludes that any improprieties in the selection process "did not operate to frustrate the goals of the Act." Id. at 706.

Id.

Finally, the Fifth Circuit has recently considered the question of whether delegation to jury clerks of judicial functions warrants dismissal of an indictment in United States v. Maskeny, 609 F. 2d 183 (5 Cir.) (per Coleman, C. J.), cert. denied, 444 U.S. 921, 100 S.Ct. 3010, 65 L.Ed.2d 1112 (1980). While the court noted that Evans was not controlling since Maskeny involved exclusions of jurors rather than inclusions, it determined that dismissal of the indictments was not in order since defendants failed to show that "the clerk made erroneous

determinations." Id. at 193 (emphasis in original).

These cases, in our opinion, stand for the proposition that a substantial statutory violation cannot be based solely on usurpation of judicial functions by jury personnel when there is no evidence that the clerk or his staff made erroneous determinations based on nonobjective, nonstatutory grounds. In the case sub judice, however, there is substantial evidence that the clerk's office made subjective, wrongful exclusions in a significant number of cases of prospective jurors based on nonstatutory grounds. These exclusions were granted because of the persistent failure to comprehend the specific objective criteria in filling the 1977 qualified wheels which both Congress and the district court deemed

sufficient to warrant excusal, exemption, or disqualification. Of course, a certain number of clerical errors may be expected in any undertaking of the magnitude confronting the Northern District of Georgia. Nonetheless, this expectation may not justify or excuse the numerous and consistent wrongful exclusions which were the result of the application of nonstatutory and nonobjective grounds.[49] Since the erroneous excusals, exemptions, and disqualifications of potential jurors by the clerk's office resulted in frustration of the Act's policy of exclusion on the basis of specific objective criteria, we determine them to constitute substantial noncompliance.[50]

Erroneous Permanent Excuses by Jury Clerk After Summoning

Defendants challenge the practice of the jury clerk in permanently excusing from jury service persons summoned for grand jury duty. Specifically, they allege that the clerk made erroneous exclusions in 74 instances from 1978 until February 1980.

Our examination of joint exhibits 156 through 165 reveal that 10 grand juries were empaneled during the relevant time period. Five hundred persons were summoned for service; 45 summonses were returned to the clerk's office unserved.[51] Of the 445 persons who were served, 141, or 32%, were excused prior to reporting by the clerk's office.

Regarding the 74 specific excusals challenged by defendants, five were actually excused by the court,[52] and one was absent from the proceedings without cause,[53] thus leaving 68.

All but three of these individuals were permanently excused from the qualified wheel.[54]

Forty-one of the challenged excusals were based upon alleged "hardship" grounds. Fifteen of these individuals requested an excuse solely because of lack of transportation or fear of driving in downtown Atlanta,[55] while an additional 18 persons specifically requested only a temporary excuse.[56] Three others were excused because they were fulltime college students,[57] and an additional five persons requested excuses on miscellaneous "hardship" grounds.[58]

In addition to these 41 "hardship" exclusions, three persons were excused solely because they were age 70 or over, although they did not request an excuse.[59] The remaining challenged excuses were requested for medical

reasons.

Our concern with these challenged excusals is not so much with the fact that the jury clerk, rather than the district judge, granted hardship excuses; nor do we deem it appropriate to determine whether the district judge would have likewise granted such excuses. Rather, we find that these exclusions constitute serious violations of the Act and Plan since they were granted on a permanent basis when a temporary excuse, if any, was more appropriate.

The Plan is silent on the subject of hardship excuses. The Act, however, provides that "any person summoned for jury service may be (1) excused by the court, upon a showing of undue hardship or extreme inconvenience, for such period as the court deems necessary, at the conclusion of which such person

shall be summoned again for jury service." 28 U.S.C. § 1866(c). "Undue hardship or extreme inconvenience" is defined as follows:

> great distance, either in miles or travel time, from the place of holding court, grave illness in the family or any other emergency which outweighs in immediacy and urgency the obligation to serve as a juror when summoned, or any other factor which the court determines to constitute an undue hardship or to create an extreme inconvenience to the juror; and in addition, in situations where it is anticipated that a trial or grand jury proceeding may require more than thirty days of service, the court may consider as a further basis for temporary excuse, severe economic hardship to an employer which would result from the

absence of a key employee during the period of such service.

28 U.S.C. § 1869(j).

The legislative history states:

> [E]xcuses may be granted for such period as the judge deems necessary. At the end of the period, the prospective juror shall be summoned again for jury service. When resummoned, such person may be reexcused if the hardship or inconvenience persists. The process of summons and excuse may be repeated as often as the judge determines that it is appropriate. When the cause for excuse finally ends, however, the person excused is to be summoned for service immediately without having his name reinstated in the qualified jury wheel.

[1968] U.S. Code Cong. & Ad. News 1792, at 1804. In addition, the Fifth

Circuit in Kennedy, supra, noted that "a prospective juror drawn from the qualified wheel cannot permanently escape service because of hardship or extreme inconvenience. Even if he or she meets the strict standard for the excuse, the prospective juror must serve as soon as the hardship or inconvenience terminates. 28 U.S.C. § 1866(c)." Id. at 612 n.6.

It is clear beyond peradventure, therefore, that the Act contemplates only temporary excuses for hardship reasons. Turner, however, permanently excused these individuals because she was of the opinion that their requests for temporary excuses could not be feasibly accommodated. In her view, someone was either permanently excused from the qualified wheel or was set over for another particular panel. Since grand juries were empaneled only

four or five times a year, Turner stated that, to her, it seemed impracticable to set over persons to another grand jury panel. Hence, persons summoned to serve on a grand jury were rarely set over to another panel.[60]

Turner was mistaken in her impression that temporary excusals could not be accommodated. Turner needed only have provided the GSA with information relating to when a particular juror excused on hardship grounds would be able to serve. The computer then would have gone through the deferred names and picked any person who agreed to serve that month.[61] Turner's permanent excusals of virtually all persons excused after being summoned for grand jury service and prior to reporting, even if they requested a temporary excuse or indicated only an

impermanent hardship, constitute a clear violation of the Act.

Similarly, Turner permanently excused from jury service all persons who were excused in court by the district court judge, regardless of the reason for the excuse.[62] Since only 23 persons may serve on a grand jury, and since as many as 16 individuals were excused in court to arrive at the proper number of grand jurors, some persons were obviously excluded merely because they were "surplus" jurors; many others had requested excuses only on "hardship" grounds. Turner excused these individuals permanently at all times except on the rare occasion when the district court judge specifically told her to set over a particular juror.[63] She never discussed with the district judges her practice. Those judges who testified stated that they were not

aware of whether persons excused in open court were permanently excused or were put back in the qualified wheel. Judge O'Kelley, however, stated that it was his intention that persons excused by him in court would be returned to the qualified wheel unless they had a valid ground for permanent excuse pursuant to the Plan or Act.

Neither the Plan nor the Act grants an excuse for persons who have appeared in court to serve, but have not actually served, on a grand jury. Indeed, the Act makes a definite distinction between "appearing to serve" and "serving" by providing:

> In any two-year period no person shall be required to (1) <u>serve or attend court for prospective service</u> as a petit juror for a total of more than thirty days, except when necessary to complete service in a

> particular case, or (2) serve on more than one grand jury, or (3) serve as both a grand and petit juror.

28 U.S.C. § 1866(e) (emphasis added). Like the Act, the Plan grants an optional excuse only if the individual "has served as a grand or petit juror." Local Plan at 88 (emphasis added). No excuse is available for those who have merely attended court for prospective service as a grand juror. The fact that the Act "contemplate that many persons who have been called but have not served may be called again" was recognized by the Fifth Circuit in Smith, supra, at 114.

Almost 50% of all persons summoned to serve on a grand jury were permanently excluded from the qualified wheel regardless of the reasons for which the excuse was granted. The practices of the jury clerk in permanently excluding

from the qualified wheel virtually all persons who requested an excuse when summoned and virtually all persons who were excused in court by a district court judge, without regard to the reason for which a particular excuse was requested or granted, frustrate the Act's goal of granting exclusions from service on objective grounds only, and therefore constitute a substantial violation of the Act.[64]

In sum, the erroneous practices of excluding qualified persons from the qualified jury and of wrongful granting of permanent excusals, when considered as a whole as prevailing in the Northern District of Georgia, significantly frustrate achieving objectivity as one of the major goals of the Act and Plan. We cannot overlook such serious, persistent deviations by accepting the

government's argument that the number of wrongfully excluded prospective jurors, apportioned among four qualified jury wheels, amounts to only a small percentage of the 59,352 juror questionnaires mailed out and should be viewed as mere occasional administrative errors, of de minimus effect. Neither is it necessary to our decision that we uphold defendants' contention that of the 42,105 juror questionnaires which were returned, the clerk's office disqualified on nonobjective grounds, or otherwise wrongfully excused, as many as 1537 persons out of the total of 11,875 persons found to be disqualified.

What is important, and has been effectively demonstrated to the court, is that the stated practices and procedures have been carried out by the clerk's office contrary to the mandate

of the Act and Plan, and are violations of such substance and magnitude as to require our disapproval.

CONCLUSION

This case represents perhaps the most intensive and far reaching challenge of the administration of a federal judicial district jury plan since the adoption of the Jury Selection and Service Act 13 years ago. The record clearly discloses that both sides have undertaken close examination and scrutiny of hundreds of executed juror questionnaires and have closely studied the manner in which the Local Plan has been administered. Moreover, the arguments of able counsel have assisted the court in a penetrating analysis of the mechanics of administering the jury selection process in a large metropolitan district. It is beyond cavil, however, that Congress and the

district court in devising its Local Plan emphatically and specifically address as matters of prime concern the need for obtaining a fair cross section of the community to serve as grand and petit jurors in the federal district courts, selected objectively through a random process. The painstaking and detailed care of Congress and the district court to devise specific methods to accomplish these goals would be whittled away if courts fail to require their observance by judicial officers as well as court personnel who are charged with the responsibility for administering the jury selection process. The rule of reason, which regards inadvertent, imperfect efforts as insubstantial, must require that the jury selection process not become infected with subjective extra-statutory standards, nor can the rule of reason

allow authorized methods of randomness to be displaced by private whim.

For these reasons, the court will direct the entry of an order sustaining the motions to dismiss the indictments of the affected defendants without prejudice, of course, to reindictment by properly selected and drawn grand juries. The court is mindful of the public interest in the Northern District of Georgia in minimal interruption of the orderly processes of the federal criminal justice system; for that reason, the court has given priority to resolving this controversy as promptly as possible considering a lengthy record. Dismissal of the indictment is the remedy required by the Act for substantial noncompliance. However, the remedy here applied need not result in a long delay of reindictment because the district's new

master and qualified jury wheels must, by law, be filled not later than September 1, 1981.[65]

Since new indictments are required, we see no basis for also granting the injunctive relief sought by the Federal Public Defenders Office, to make certain the requirements of the Act and Plan will be scrupulously followed in the future.

We wish to make clear that we do not believe that the jury clerk and her assistants acted maliciously or in bad faith in making the errors heretofore described. Indeed, Turner appeared to us to be a dedicated public servant who performed the magnitude of tasks imposed on her, as she understood them, to the best of her ability. Rather, the violations which we have found resulted from lack of comprehension on her part as to the importance of

following strictly the Act and Plan. We believe that these problems arose in large part because of the failure of Turner's superiors to properly supervise the jury clerk. Regardless of the reason for these errors, however, we are convinced that, whether viewed separately or in combination with each other, they constitute a substantial failure to comply with the Act and Plan.[66]

Our disposition of these cases on the foregoing grounds renders it unnecessary to consider the constitutional challenges raised by Rule 12(b) motions, F.R.Crim.P., previously bifurcated by this court on January 5, 1981.

* U. S. v. David Alexander, CR 79-09 N; U. S. v. Alvin Bernardo Wright, CR 79-91-A; U. S. v. Dale Campbell, CR 79-196-A; U. S. v. Robert A. Snowden, CR 80-08 G; U.S. v. Kaushik Kapadia, CR 80-11 N; U. S. v. Richard Bearden, CR 80-14 N; U. S. v. John Almond Deardoff, CR 80-18 R; U. S. v. Robbie Dean Hall, CR 80-21 R, CR 80-38 R, CR 80-40 R; U. S. v. Perry G. Evans, CR 80-24 R; U. S. v. Eddie Joe Tinsley, CR 80-180 A; U. S. v. Mark Edgar Grainger, CR 80-209 A; U. S. v. Jerry Suggs, CR 80-235 A; U.S. v. Ezzard Ferguson, CR 80-239 A; U. S. v. Donald Carl Thompson, DR 80-262 A; U. S. v. Michael W. Cassel, CR 80-266 A; U.S. v. St. Vouis Raymond, CR 80 268 A; U. S. v. Gary Rogers, CR 80-273 A; U. S. v. Clarence Stowers Jr., CR 80-276 A; U. S. v. Derek John Hiscutt, CR 80-285 A; U. S. v. Franklin Daniel Stanford, CR 80-286 A; U.S. v. James Boderick, CR 80-287 A; U. S. v. Clinton Jerome Rhymes, CR 80-298 A; U. S. v. Herman Lee Smith, CR 80-299 A; U. S. v. Mary Nell Hart. CR 80-301 A; U. S. v. Gary Bissell, CR 80-306 A; U. S. v. Eric Nygard, CR 80-307 A; U. S. v. Johnny Page Hughes, CR 80-308 A; U. S. v. Richard Roberts, CR 80-310 A; U. S. v. Farrell Nixdorf, CR 80 313 A; U. S. v. Mose Austin, CR 80-323 A.

1. Consolidated with this hearing are 34 criminal cases. All defendants and the government agreed to a consolidation of the

hearing upon the pretrial motions to dismiss. The lead defendants in this case are Northside Realty Associates, Inc., et al., herein referred to as real estate defendants, and Browning-Ferris Industries of Georgia, Inc., et al., herein referred to as garbage case defendants; they will be mentioned by name, but unless the context otherwise requires, the court's disposition of their motions will govern all cases consolidated for the purpose of evidentiary hearings on the merits of defendants' motions to dismiss.

2. The charge of sex bias in selection of forepersons and deputy forepersons was made September 24.

3. Magistrate Forrester has telephoned our law clerk that he informed counsel for the government and defendants after the show-cause hearing that, although he entertained serious doubts about the timeliness of the statutory grounds asserted under 28 U.S.C. §1861, he was not inclined to find a waiver under Rule 12, F.R.Crim.P., because it appeared that constitutional issues would likely have to be heard.

4. (e) Ruling on Motion. A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue

or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.

5. Defendants in all other cases consolidated in this action have filed similar motions and supporting affidavits, with one exception: the motion of defendant James Atchley in CR 80-11 N which was filed on December 3, 1980, twelve days after his initial appearance with counsel. No affidavit was attached to the motion, which was dismissed in a bench ruling on December 18. No motion to reconsider this ruling has been filed. As to this defendant, we conclude that, not only were the requirements of 28 U.S.C. § 1867 not complied with, but, furthermore, the motion was waived under Rule 12(f).

6. § 1867. Challenging compliance with selection procedures

(a) In criminal cases, before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of

substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

7. (d) Upon motion filed under subsection (a), (b), or (c) of this section, containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with the provisions of this title, the moving party shall be entitled to present in support of such motion the testimony of the jury commission or clerk, if available, any relevant records and papers not public or otherwise available used by the jury commissionr or clerk, and any other relevant evidence. If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the grand jury, the court shall stay the proceedings pending the selection of a grand jury in conformity with this title or dismiss the indictment, whichever is appropriate. If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the petit jury, the court shall stay the proceedings pending the selection of a petit jury in conformity with this title.

8. (b) Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial

by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial;

> (1) Defenses and objections based on defects in the institution of the prosecution; or
>
> (2) Defenses and objections based on defects in the indictment or information . . .

9. (c) Motion date. Unless otherwise provided by local rule, he court may, at the time of the arraignment or as soon thereafter as practicable, set a time for the making of pretrial motions or requests and, if required, a later date of hearing.

10. It will serve no useful purpose to detail the specific dates of motions and affidavits filed by the remaining defendants in the consolidated hearing. As later held, all defendants are entitled to be heard on all challenges of constitutional magnitude. Only in CR 80-08 G, United States v. Robert A. Snowden, was a continuance granted by Judge O'Kelley because of the late filing of motions to dismiss by certain defendants who contended that they had filed written motions to dismiss on grounds of challenge to the grand jury on the original indictment. After a superseding indictment was returned against them, they orally moved to adopt all previously

submitted written motions, which allegedly was allowed by the magistrate. Since Judge O'Kelley had entered an order of continuance prior to our hearing of January 5, 1981, we nevertheless include CR 80-08 G in the present consolidated proceedings.

11. (f) Effect of Failure to Raise Defenses or Objections. Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

12. In footnote 7, the Geelan court observed that the Jury Selection Act, 28 U.S.C. § 1861 et seq. though prohibiting discrimination according to race, color, religion, sex, national origin or economic status in the selection of jurors, does not prohibit age discrimination. 509 F.2d 741 n.7.

13. The Supreme Court has since extended the waiver doctrine, embraced within Rule 12 in federal prosecutions, to habeas corpus cases of state-convicted defendants whenever state courts have ruled there was procedural waiver under state law. Francis v. Henderson, 425 U.S. 536, 96 S.Ct. 1708, 348 L.Ed.2d 149 (1976).

14. Since the original trial of Clifford Davis occurred prior to implementation of the Jury Selection and Service Act, 28 U.S.C. § 1861 et seq., the Supreme Court was not concerned with its application. Nevertheless, the Court emphasized the effect of Rule 12(b) as applicable to all direct federal prosecutions.

> Rule 12(b)(2) promulgated by this Court and, pursuant to 18 USC § 3771 [18 USCS § 3771], "adopted" by Congress, governs by its terms the manner in which the claims of defects in the institution of criminal proceedings may be waived. See Singer v. United States, 380 U.S. 24, 37, 85 S.Ct. 783 [791], 13 L.Ed.2d 630 (1965). Were we confronted with an express conflict between the Rule and a prior statute, the force of § 3771, providing that "[a]ll laws in conflict with such rules shall be of no further force or effect," is such that the prior inconsistent statute would be deemed to have been repealed.

411 U.S. at 241, 93 S.Ct. at 1582, 36 L.Ed.2d at 224.

15. But see note 10 supra.

16. The death of the original foreperson of the grand jury empaneled January 7, 1976, caused the appointment of a sucessor foreperson since the deputy

foreperson of that grand jury withdrew her name from consideration as succeeding foreperson. See Govt.Exh. 116.

17. Judge Edenfield empaneled 6 grand juries, Judge Moye 10, Judge Freeman 10, Judge O'Kelley 5, Judge Hooper 7, Judge Hill 2, Judge Shoob 1 and Judge Vining 1.

18. Both black forepersons were males. One was appointed by Judge Moye; the other was originally appointed by Judge Edenfield as deputy; he later assumed the duties of foreperson by agreement between himself and the appointed foreperson with the approval of Judge Edenfield.

19. Judge Freeman appointed 1 black and 4 white female deputies; Judge Moye appointed 2 black and 4 white females. Judge Hooper appointed 3 white females, and Judges Shoob and Vining each appointed 1 white female deputy.

20. The race of 16 males and 13 females could not be determined.

21. See joint Exh. 124 to 165 and Govt.Exh. 1 to 42. In case of conflicts between government exhibits and questionnaires in joint Exh. 124 to 165, we relied upon the original source material. When available, "race and sex" reports prepared by the clerk's office and found in certain joint exhibits were relied upon. When not affirmatively

indicated, gender assumptions were made, when reasonable to do so, based on individual's name.

22. O'Reilly made no such separate calculations for the Gainesville, Newnan, and Rome Divisions.

23. If deputy forepersons and forepersons were treated together, the results of the statistical analysis, especially by sex, would be less dramatic than those on which O'Reilly based his conclusions. The prosecution failed to show the result of an analyais combining deputy forepersons with forepersons.

24. The judge has empaneled only one federal grand jury and, of course, knew nothing of its deliberative processes.

25. This precise question remains undecided by any appellate court upon detailed review of federal grand juries selected under Rule 6(c), F.R.Crim.P., pursuant to 28 U.S.C. § 1861 et seq., and a plan of a federal district court approved by the Circuit reviewing panel as distinguished from the operation of state grand juries. It is safe to assume the method of jury foreperson appointment, type of grand jury selection, the number of jurors comprising the grand jury, duration of service, and duties apart from consideration of indictments widely vary among the states of

the Union, if not among those within the Fifth Circuit.

The only case directly holding that constitutional significance attaches to the position of foreperson of federal grand juries is a district court opinion, United States v. Jenison, 485 F.Supp. 655, 661 (S.D.Fla.1979). That holding was premised on a view that the Supreme Court in Rose v. Mitchell, 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979), which, although reversing the Court of Appeals, "had no disagreement with the Sixth Circuit's conclusion that 'proof of discrimination in the selection of a grand jury foreman mandates the same remedy as does proof of discrimination in the selection of the grand jury.'" Jenison at 661. Jenison found the duties of the state grand jury foreperson indistinguishable from his federal counterpart. Id. Sitting as a district judge by designation, Circuit Judge Hatchett found statistical evidence pertaining to gross underrepresentation of blacks as forepersons (14.6% absolute disparity, 88% comparative disparity), and of women as forepersons (43% absolute disparity and 81% comparative disparity). All of the sitting judges in the Southern District of Florida testified that they made their selections of forepersons and deputies without regard to race or sex. It seems critical to the successful rebuttal of the defendants' prima facie case that

the court rules that "[i]t is within the [federal] judge's discretion to appoint the person he deems most qualified to the office of foreperson. See, Rule 6(c), Fed.R.Cr.P." Jenison at 666 (emphasis original). Rose v. Mitchell, supra, assumed, without deciding, that the foreperson of Tennessee's system, which permitted the grand jury foreperson to be appointed by the judge from the public at large and not from the veniremen chosen at random as were other members of the grand jury, had constitutional significance. Since the Sixth Circuit Court decision holding the Constitution was violated was reversed on appeal, the precedential value of that holding, at least as it appertains to the federal grand jury system, remains debatable. We are mindful that on two occasions, the Fifth Circuit, in two state prosecution cases, had assumed that "the right to a grand jury selected without regard to race applies fully when only the selection of the foreperson is at issue rather than the selection of the entire grand jury venire." Williams v. State of Mississippi, 608 F.2d 1021, 1022 (5 Cir. 1980) (construing Mississippi law). The same assumption was made in Guice v. Fortenberry, 633 F.2d 699, 703 n.6 (5 Cir. 1980) (interpreting Louisiana law).

Our reading of these cases, save for the Jenison decision, is that appintment by a judge under Rule

6(c) of a foreperson and deputy foreperson in a federal grand jury drawn randomly and from a fair cross-section of the community, pursuant to the mandates of 28 U.S.C. § 1861 et seq., and an approved district court plan, presents an issue of constitutional dimension which remains to be fully explicated and authoritatively decided by appellate authority for the guidance of district judges.

Assuming constitutional significance of the position, defendants rely primarily on Castenada v. Partida, 430 U.S. 482, 494, 97 S.Ct. 1272, 1280, 51 L.Ed.2d 497 (1977), and Rose v. Mitchell, supra, as establishing the standard to be applied in determining whether an adequate showing of discrimination has been made. Although these cases were brought under the Equal Protection Clause of the fourteenth amendment, they are applicable here since "if a classification would be invalid under the Equal Protection Clause of the Fourteenth Amendment, it is also inconsistent with the due process requirement of the Fifth Amendment." Johnson v. Robison, 415 U.S. 361, 364 n.4, 94 S.Ct. 1160, 1164 n.4, 39 L.Ed.2d 389, 396 n.4 (1974).

26. Fractional numbers are dropped to the next lowest whole number.

27. The uncontradicted testimony is that unused petit jurors were

usually "set over" to another petit jury, but unused grand jurors were seldom set over to other panels.

28. Both Turner and her assistant, Allen Newman, testified that they failed to see the importance of posting the first notice because no one ever appeared to witness the drawing. Given that adequate notice of the event was rarely posted, this fact is not surprising.

29. The Richard B. Russell Building has 23 floors, of which the court and its personnel occupy the top half-dozen floors. There is no evidence why the notices were not posted on a bulletin board located on the building's ground floor lobby or other conspicuous place frequented by the general public.

30. These starting numbers were selected for the grand juries empaneled from April 13, 1978 to February 5, 1980.

31. Dr. Wang stated that this would not hold true for the "remainder" group, i. e., those persons at the very end of the wheel. The remainder group has less chance of being chosen since fractional increment numbers are rounded to the next lowest whole number.

We view this deviation from statistical randomness as minimal. See note 36 infra. However, we do not agree with the government that United States v.

Blair, 493 F.Supp. 398 (D.Md.1980), so interpreted the Act under its randomness provisions. In Blair, the increment number used for selection from the qualified wheel was generally too small. Therefore, each jury panel contained too many names. The clerk eliminated excess names by dropping from the bottom of each panel persons whose names began with X, Y and Z. Although Blair discussed randomness, the court held, following Duren v. Missouri, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979), and United States v. Test, 550 F.2d 577 (10 Cir. 1976) (en banc), that persons having surnames beginning with X, Y and Z do not constitute a "distinct group" in the community. 493 F.Supp. at 410. Thus, Blair's analysis is based upon the independent requirement of a fair cross-section of the community, or cross-sectionality, and not upon the Act's requirement of randomness.

32. Defendants attempt to contradict Dr. Wang's assertion that starting numbers are irrelevant to randomness over the passage of time through statistical tests performed by their counsel and submitted to the court in their brief. We do not consider these materials since they do not constitute evidence.

33. 28 U.S.C. § 1866(f) states:

When there is an unanticipated shortage of available petit jurors drawn from the qualified jury wheel, the court may require the marshal to summon a sufficient number of petit jurors selected at random from the voter registration lists, lists of actual voters, or other lists specified in the plan, in a manner ordered by the court consistent with sections 1861 and 1862 of this title.

34. See timeliness requirements under the Act, supra, pp. 671-681.

35. See note 33, supra.

36. Although United States v. Huber, 457 F.Supp. 1221 (S.D.N.Y. 1978), peripherally addresses the problem, the particular facts of Huber render it wholly inapplicable.

37. In United States v. Dalton . . ., we held, inter alia, that a grand jury selection in which the drawing took place in a room in he clerk's office where only clerk personnel were present withstood a challenge based on non-public drawing of the jurors' names. The court was influenced by the fact that the room was open to the public . . . [T]he case illustrates that a complaint of lack of public access in the jury selection process is not the sort of deviation from the statutory scheme that this court is prone to view as substantial noncompliance with the Act.

546 F.2d 589 n.19.

38. In the interest of theoretical accuracy, some qualifications should be added. Although the bill declares as its policy that litigants in the Federal courts "have the right to grand and petit juries selected at random," the selection system under the bill would not be entirely random. At various points in the process, candidates for jury service may be eliminated if they fall short of the requirements for service specifically enumerated in the bill. Moreover, preemptory challenges and challenges for cause are retained. All of these instances are, strictly speaking, exceptions to a purely random selection system. But the bill otherwise firmly establishes the principle of randomness by requiring the use of random techniques for arriving at the names of those who shall then be subject to the specified bases for elimination.

It is also true that, to the extent that the bill does provide for random selection, it does not insist upon randomness in the sense in which that term might be understood by statisticians. Many districts may seek the aid of statisticians in developing systems of selection that do meet the standards of that profession, and they are encouraged to do so. No doubt such systems enhance the likelihood of attaining the cross sectional goal of the bill. But

for reasons of administrative feasibility your committee did not deem it necessary to require the use of random selection in the statistical sense. It is sufficient for the purpose of this legislation if the plan adopts some system of selection that affords no room for impermissible discrimination against individuals or groups.

Thus, for example, the plan may specify selection of every 70th name from the voter list, or every name at the bottom of a page in the list, or all the names on the list, even though in certain cases statisticians might not agree that truly random selection would be the result. Likewise, in drawing names from the mastet (sic) and qualified jury wheels some similar processes may be designated. Under this definition of randomness, the plan may also permit courts to continue to use "rotation methods" or "jury pools" in assigning persons to grand and petit juries, provided that these methods, too, are free from any taint of impermissible discrimination against groups or individuals. . . . S.Rep.No.891, 90th Cong., 1st Sess. 16 n.9 (1967).

39. We construe "improprieties" to mean misfeasance, as in this matter, rather than necessarily meaning malfeasance.

40. The terms "disqualified," "exempt," and "excused" are terms

of art with distinctive meanings. Under 28 U.S.C. § 1865(b), every person in the master wheel is qualified for jury service unless he

> (1) is not a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district;
>
> (2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;
>
> (3) is unable to speak the English language;
>
> (4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or
>
> (5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored.

Like disqualified persons, those who are exempt are barred from jury service. 28 U.S.C. § 1863(b)(6). This category must include the following persons:

> (i) members in active service in the Armed Forces of the United States;
>
> (ii) members of the fire or police departments of any State, district, territory, possession, or subdivision thereof;

(iii) public officers in the executive, legislative, or judicial branches of the Government of the United States, or any State, district, territory, or possession or subdivision thereof, who are actively engaged in the performance of official duties.

Although the Local Plan, under § 1863(b)(6), may provide for exemption of such other groups of persons as the district court finds would be in the public interest and consistent with the Act's purposes, the Northern District of Georgia has elected to exempt only the classes of persons required by the Act.

Persons excused from jury service are, on individual request, relieved of their obligation to serve on juries. The Act empowers the district to specify, in its Local Plan, groups of persons or occupational classes whose members shall be excused because jury service would entail undue hardship or extreme inconvenience to them, provided excusal would not be inconsistent with the purposes of the Act. The Act does not identify any such groups, but the district's Local Plan lists the following as those who should be excused from jury service:

(1) all ministers of the gospel and members of religious orders actively so engaged;

(2) all actively practicing attorneys, physicians, dentists, and registered nurses;

(3) any person who has served as a grand or petit juror in a federal court during the past two years immediately preceding his call to serve;

(4) persons having active care and custody of a child or children under 10 years of age whose health and/or safety would be jeopardized by their absence for jury service;

(5) a person who is essential to the care of aged or infirm persons; and

(6) all persons over 70 years of age at time of executing the jury qualification form.

Local Plan at 88.

41. In some instances, a person age 70 or over did not specifically mark the age excuse but otherwise indicated on the questionnaire that he wished to be excused (e. g., by indicating physical or mental infirmity). We deem these affirmative indications, tantamount to a request for excusal, sufficient reason for exclusion despite the fact that the block requesting excusal on account of age was not checked.

42. Government's Exh. 91 was introduced to show that 132 persons over age 70 were included in the qualified wheel for the Atlanta Division. An examination of these questionnaires reveals, however, that two of these individuals (see Govt. Exh. 92-10 and 92-54) were not age 70 or over at the time of executing the

questionnaire. Furthermore 18 of these persons (Govt. Exh. 92-6; -34; -42; -43; -45; -62; -69; -72; -74; -90; -94; -95; -104; -117; -122; -126; -129; -130) had reached the age of 70 and demanded to be excused. These 18 individuals were therefore wrongfully included in the qualified wheel, which, although less objectionable than wrongful exclusions, see United States v. Evans, 526 F.2d 701, 706 (5 Cir.), cert. denied, 429 U.S. 818, 97 S.Ct. 62, 50 L.Ed.2d 78 (1976), should not be counted to sustain the government's claim. Hence, no more than 112 persons over age 70 were properly included in the qualified wheel for the Atlanta Division.

Government's Exh. 93 shows that 16 persons over age 70 were included in the qualified wheel for the Gainesvill Division. Since two of these individuals had requested to be excused (Gov. Exh. 93-5 and 93-12), only 14 persons over age 70 were properly included.

Government's Exh. 94 shows that 31 persons over age 70 were included in the qualified wheel for the Rome Division. Since four of these individuals had requested to be excused (Gov. Exh. 94-2; -7; -9; -19) only 27 persons over age 70 were properly included.

Government's Exh. 95 shows that only 6 persons over age 70 were included in the qualified wheel for the Newnan Division.

Thus, while 159 persons were properly included in the qualified

wheels for the Northern District of Georgia, 43 persons under age 70 were improperly excluded on the basis of age and 135 persons over age 70 were improperly excused, for a total of 188 wrongful exclusions based on age.

43. See note 42 supra.

44. In addition, at least 25 persons were excluded from the qualified wheel only because of intradivisional moves. It is undisputed that these exclusions were wrongful.

45. It is unfortunate that the opinion does not indicate how many persons were erroneously excluded on account of intradistrict changes in residence.

46. Many of these problems would have been alleviated by more frequent drawings from the master wheel of names to be sent juror questionnaires rather than drawing all names and sending all questionnaires to prospective jurors at one time. 28 U.S.C. § 1864(a), however, leaves to the discretion of the district court the frequency of such drawings from the master wheel.

47. For appellate purposes, the court is dividing into categories those groups of questinnaires which we deem to be wrongfully excluded as well as those which we find to be properly excused, exempted, or disqualified. In

addition, we are separating those challenged questionnaires that the court finds it unnecessary to rule upon.

48. The entire discussion by the court on this issue was as follows:

> The defendant alleges that the district does not comply with its own Plan and with the Act because the Jury Clerk, and not the Chief Judge, determines who among those called for jury service is qualified for, exempt from, or excused from service, and that he likewise usurps the Chief Judge's function by granting postponements. See Plan Art. VI. With the exception of one discretionary exemption category, i.e., "persons as to whom the Chief Judge finds for reasons other than the foregoing that jury service would constitute undue hardship or extreme inconvenience," Art. V, the other criteria consist of eight well defined, objective status exemptions mirrored in check-off boxes on the Juror Qualification Questionnaire. It would be an absurd waste of judicial manpower to require the Chief Judge to abstract this information from the questionnaires or to monitor the Jury Clerk as he does so, and the implied delegation of this ministerial task to the Jury Clerk in no way constitutes a "substantial failure" to comply

with the Act. Insofar as the prospective juror claims "undue hardship or extreme inconvenience," such requests are "made to the Chief Judge or to the judge who impanels the jurors on the day they are summoned to report." Cornelius Affidavit ¶ 14.
457 F.Supp. at 1231.

49. An example of utilization of nonobjective criteria as grounds for exclusion is apparent from the testimony of Allen Newman, Turner's assistant in the qualification process, that persons over age 70 were excused even if they did not request excusal if their handwriting was "shaky" or if they resided in a nursing or retirement home. Newman testified that these things indicated to him "mental infirmity."

50. United States v. Matthews, 350 F.Supp. 1103 (D.Del.1972) is not contrary to our holding. There, defendants challenged 49 excusals of persons from service. The court found that only 17 persons were wrongfully excluded and that 10 of these excuses were granted by the judge on the basis of undue hardship and extreme inconvenience and therefore denied defendants' motion to dismiss. Here, of course, we have far more than 17 wrongful exclusions, none of which were granted by a district court judge who would more fully

appreciate the consequences of his actions.

Neither is United States v. Gurney, 393 F.Supp. 688 (M.D.Fla.1974), contrary to our decision. In Gurney, the district court found that, with only one exception, exclusions were not based on nonstatutory or nonplan grounds. Id. at 705.

51. A comparison of the returned summonses with the individuals' questionnaires indicated that in 16 cases (representing 36% of returned questionnaires) summonses were sent to the same address as that to which the questionnaires were mailed, although the individuals indicated on the completed questionnaire that they had changed addresses. In all cases of returned summonses, the only indication of follow-up is the fact that the jury clerk usually sent an "urgent notice" (see Govt. Exh. 114) to those persons who had not returned juror information cards. This notice, however, was sent to the same address as that to which the summons was sent. We point out these factors only as examples of poor administration easily corrected by the clerk's office.

52. Juror questionnaire numbers 314190; 376320, 041100; 190770; and 240150. Although defendants contend that these individuals were excused by the clerk's office, Govt. Exh. 46 indicates

they were excused at empanelment by Judge Vining.

53. Juror questionnaire number 225570 in Joint Exh. 157. In examining Joint Exh. 156 through 165, we noted that 5 persons were absent from proceedings without cause. There is no indication in the record of any action being taken against these individuals. Apparently, they were merely excused and therefore taken out of the qualified wheel. 28 U.S.C. § 1866(g) requires that a person summoned for jury duty who fails to report

> shall be ordered by the district court to appear forthwith and show cause for his failure to comply with the summons. Any person who fails to show good cause for noncompliance with a summons may be fined not more than $100 or imprisoned not more than three days, or both.

Persons should not, of course, be allowed to permanently escape jury duty because of failure to attend.

54. See juror questionnaire numbers 113120; 153580; and 116810, which were apparently set over to another term. These are the only 3 jurors of the 141 excused by the jury clerk after summoning who were not permanently excused.

55. See juror questionnaire numbers 188160; 414870; 203610; 375460; 534770; 455960; 114510;531290; 004390; 091910; 471000; 479170; 015950; 203170; and 494010. In

regard to individuals who were excused because of lack of transportation, 28 U.S.C. § 1871(f) provides that "[a] juror who must necessarily use public transportation in traveling to and from court, the full cost of which is not met by the transportation expenses [otherwise] allowable . . ., may be paid the actual reasonable expense of such public transportation."

56. See juror questionnaire numbers 352250 (requested temporary excuse because of 2 children aged 9 and 10); 237970 (requested 3-month excuse because fulltime student); 116960 (3-month excuse requested because of planned vacation); 229760 (18-month excuse requested because of small baby); 179880 (requested temporary excuse because fulltime student); 531840 (grandson requested temporary excuse on behalf of 62-year-old prospective juror); 314600 (doctor requested 1-week temporary excuse on behalf of individual); 389010 (requested 1-month excuse until child got settled back in routine of school); 401200 (requested 6-month excuse because she could not arrange for child care); 041790 (prospective juror recently underwent operation but expected to recover in 2 months, "so please don't let this be the last time"); 127410 (requested temporary excuse because of planned vacation); 547960 (doctor requested temporary excuse on behalf of individual since she was pregnant); 263120

(requested 3-month excuse because of recent foot surgery); 002720 (doctor requested temporary excuse); 365830 (requested temporary excuse because mother scheduled for surgery which would take 6 to 8 weeks for recovery); 551810 (requested 1-month excuse because secretary to superior court judge and necessary for her to be present during that term of court); 445280 (requested temporary excuse because scheduled for thyroid surgery during time for which summoned); 089530 (requested temporary excuse because currently fulltime college student).

57. See juror questionnaire numbers 115200, 545310 and 573560.

58. See juror questionnaire numbers 478130 (requested excuse because 8 months pregnant); 400180 (requested excuse because beginning to teach class of multi-handicapped children and presence in classroom was necessary); 76850 (requested excuse because was to be hospitalized at time for which summoned); 573970 (requested excuse on financial ground by stating "if you would pay by the day, where I would have enough money to go back and forth, I would go"); 078210 (requested excuse because pregnant and had had previous miscarriages).

59. See juror questionnaire numbers 213130; 228730; and 535300.

Turner testified that she excused persons over age 70, whether they requested an excuse or not, since she thought these persons would request an excuse when they reported. In addition, she sometimes telephoned persons over age 70 who did not request excusal to ask them if they wanted to be excused. There is no indication that these 3 individuals over age 70 requested an excuse over the telephone.

60. Turner apparently believed that persons summoned for grand jury service could not be set over to a petit jury panel.

61. See Govt. Exh. 190 at ¶¶ 12 and 13.

62. Seventy-four persons summoned to appear were excused in court by a district court judge. All of these excusals were permanent.

63. This apparently never happened during the relevant time period.

64. In addition to constituting a violation of the objectivity principle, Kennedy, supra, indicates that the permanent exclusion of individuals because of hardship violates the randomness principle, since "the Act and its random selection policy leave no room for the additional operation of personal preference on the part of those whose names are drawn for jury service." Id. at 612 n.6.

65. Under the Local Plan, the wheels can be refilled much sooner than September 1. See Local Plan at 86.

66. All violations, i. e., nonrandom drawing of starting numbers and failure to post adequate notice; erroneous excusals, exemptions and disqualifications; and erroneous permanent excusals after summoning, apply to all defendants except the starting number/notice violation does not apply to defendant Stowers in No. 80 276A, since he was charged with an information and was not indicted, or to defendants Bearden (No. 80-14N) and Nixdorf (No. 80 313A) since these two defendants were indicted after the starting number/notice violations was corrected.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

Northside Realty Associates, Inc.,
Movant,

vs.

United States of America,
Respondent.

Criminal No. CR 80-62A

J U D G M E N T

The Court having sustained the defendant's motion to dismiss the indictment because of failures to comply with the Jury Selection and Service Act, 28 USC Section 1861 et seq., and the district's Local Plan for the Random Selection of Grand and Petit Jurors, the indictment is hereby dismissed without prejudice.

This the 17 day of March, 1981.

/S/
WILLIAM C. KEADY
Chief Judge, United States
District Court for the
Northern District of
Mississippi, sitting by
designation in the Northern
District of Georgia

Filed and entered in
Clerk's Office this
4/6/81
BEN H. CARTER, CLERK

BY: Janice Watts
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

Barton & Ludwig, Inc.,
Movant,

vs.

United States of America,
Respondent.

Criminal No. CR 80-62A

J U D G M E N T

The Court having sustained the defendant's motion to dismiss the indictment because of failures to comply with the Jury Selection and Service Act, 28 USC Section 1861 et seq., and the district's Local Plan for the Random Selection of Grand and Petit Jurors, the indictment is hereby dismissed without prejudice.

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Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

Harry Norman & Assoc., Inc.,
Movant,

vs.

United States of America,
Respondent.

Criminal No. CR 80-62A

J U D G M E N T

The Court having sustained the defendant's motion to dismiss the indictment because of failures to comply with the Jury Selection and Service Act, 28 USC Section 1861 et seq., and the district's Local Plan for the Random Selection of Grand and Petit Jurors, the indictment is hereby dismissed without prejudice.

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4/6/81
BEN H. CARTER, CLERK

BY: Janice Watts
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

Clover Realty Company,
Movant,

vs.

United States of America,
Respondent.

Criminal No. CR 80-62A

J U D G M E N T

The Court having sustained the defendant's motion to dismiss the indictment because of failures to comply with the Jury Selection and Service Act, 28 USC Section 1861 et seq., and the district's Local Plan for the Random Selection of Grand and Petit Jurors, the indictment is hereby dismissed without prejudice.

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4/6/81
BEN H. CARTER, CLERK

BY: Janice Watts
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

Edwin A. Isakson,
Movant,

vs.

United States of America,
Respondent.

Criminal No. CR 80-62A

J U D G M E N T

The Court having sustained the defendant's motion to dismiss the indictment because of failures to comply with the Jury Selection and Service Act, 28 USC Section 1861 et seq., and the district's Local Plan for the Random Selection of Grand and Petit Jurors, the indictment is hereby dismissed without prejudice.

This the 17 day of March, 1981.

/S/
WILLIAM C. KEADY
Chief Judge, United States
District Court for the
Northern District of
Mississippi, sitting by
designation in the Northern
District of Georgia

Filed and entered in
Clerk's Office this
4/6/81
BEN H. CARTER, CLERK

BY: Janice Watts
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

Chandler B. Barton,
Movant,

vs.

United States of America,
Respondent.

Criminal No. CR 80-62A

J U D G M E N T

The Court having sustained the defendant's motion to dismiss the indictment because of failures to comply with the Jury Selection and Service Act, 28 USC Section 1861 et seq., and the district's Local Plan for the Random Selection of Grand and Petit Jurors, the indictment is hereby dismissed without prejudice.

This the 17 day of March, 1981.

/S/
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District Court for the
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NORTHERN DISTRICT OF GEORGIA

Harry Norman, Jr.,
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UNITED STATES of America,
Plaintiff-Appellant,

v.

NORTHSIDE REALTY ASSOCIATES, INC.; Barton & Ludwig, Inc.; Harry Norman & Associates, Inc.; Clover Realty Co.; Edwin A. Isakson; Chandler B. Barton; and Harry Norman, Jr., Defendants-Appellees.

No. 81-7285

United States Court of Appeals,
Fifth Circuit.*
Unit B

Oct. 19, 1981.

Appeals from the United States District Court for the Northern District of Georgia.

Before RONEY, VANCE and RANDALL, Circuit Judges.

RONEY, Circuit Judge:

This case presents an extensive challenge to the selection of grand juries in the Northern District of Georgia. The district court dismissed numerous indictments on the ground the

selection process failed to comply with the Jury Selection and Service Act. 510 F.Supp. 668 (N.D.Ga. 1981). We reverse, holding that several of defendants' claims were not timely presented and that the remaining claims did not establish substantial violation of the Act. Because constitutional issues raised by defendants were not addressed by the district court, we remand for that purpose.

Three groups of defendants are involved in this case, all indicted during 1980 by federal grand juries in the Northern District: (1) the "real estate" defendants, indicted jointly for criminal antitrust violations; (2) the "garbage case" defendants, also indicted jointly for antitrust violations; and (3) the "individual" defendants, indicted separately for various federal crimes. Although one of the individual

defendants was charged by information rather than by indictment, he will be treated for purposes of this appeal as though indicted.

In August 1980, the real estate defendants filed a motion to dismiss their indictment on the ground the grand jury selection process violated the Jury Selection and Service Act (the "Act"), 28 U.S.C.A. § 1861 et seq., and the Local Plan adopted thereunder. They also asserted various constitutional deficiencies. This motion culminated several months of investigation of grand jury records and practices in the clerk's office. The garbage case and individual defendants later filed motions to dismiss which were based on the findings and claims of the real estate defendants.

Proceedings on the motions were consolidated by agreement of the parties. In January 1981, the district

court held a nine-day hearing in which it received evidence consisting of voluminous exhibits, live testimony and depositions, and heard extended oral arguments of counsel.

In a lengthy opinion, the court rejected the Government's challenge to the timeliness of the real estate and garbage defendants' claims. On the merits, the court found numerous violations by the clerk's office of the Act and Local Plan. Holding the violations to be substantial, it dismissed the indictments pursuant to the Act.[1] Because of its disposal of the case on statutory grounds, the court declined to reach the constitutional issues.

The Government appeals from the dismissal of five of the indictments: those of the real estate and garbage case defendants and three of the individual

defendants. It challenges both the rejection of the timeliness claim and the finding of substantial violations of the Act.

I. The Jury Selection and Service Act and the Local Plan

Before addressing the specific issues, which relate generally to how the clerk drew names from the jury wheels and excused persons from jury service, it will be helpful to briefly outline the general statutory scheme as well as the jury selection process in the Northern District of Georgia. The Jury Selection and Service Act, enacted in 1968, seeks to ensure that potential grand and petit jurors are selected at random from a representative cross section of the community and that all qualified citizens have the opportunity to be considered for service. 28 U.S.C.A. § 1861. See also, H.R. Rep. No. 1076, 90th

Cong., 2d Sess. (1968), reprinted in 1968 U.S. Code Cong. & Admin. News 1792, 1792 [hereinafter House Report]. The Act prohibits discrimination on account of race, color, religion, sex, national origin, or economic status. 28 U.S.C.A. § 1862.

The Act provides that each district court shall devise a written plan, known as a "local plan," to achieve the twin objectives of nondiscrimination and opportunity of service. The plan must be approved by the judicial council of the circuit in which the district is located.[2] While leaving the district courts a certain degree of flexibility in designing a plan to accommodate local conditions, the Act does prescribe a general procedural scheme to be followed.

A Local Plan was devised for the Northern District and approved by a

reviewing panel of this Circuit's Judicial Council. Pursuant to the Act and Plan, the district uses voter registration lists from each of its counties. Names are selected from the lists to assure proportional representation for the four divisions in the district. A master wheel computer tape is then created in which the selected names are placed in alphabetical order and each name is given a number. The tape retains divisional identity for each name.

The names on the master wheel are used to construct the qualified jury wheels, one for each division. The computer, which is operated by the General Services Administration (GSA), addresses standard Juror Qualification Questionnaires to the persons on the master wheel. These forms are mailed with the request they be signed, dated and returned to the clerk's office.

Upon receipt by the clerk's office, the questionnaires are screened to determine whether they should be included or excluded from the respective qualified wheels. There are several grounds on which persons may be excused, exempted or disqualified from jury service. These will be discussed more fully later.

When a prospective juror is found qualified, this fact is noted on a computer card. The card is then returned to the GSA, which feeds the information to the computer for recording on the master wheel tape. Thus, the qualified wheels consist of prospective jurors marked "qualified" on the master wheel tape. There is apparently no separate tape or computer printout of only qualified jurors.

When the court requires a panel of jurors, grand or petit, it sends an order to the clerk's office. The clerk or his

designate is responsible for drawing the names for the panel, selected in proportion to the number of qualified jurors in each division. A grand jury panel usually numbers fifty, of which 33 are picked from the Atlanta division, 8 from Rome, 5 from Newnan, and 4 from Gainesville. Angela Turner, the jury clerk, was placed in charge of this selection process in the Northern District.

To select the names for a given panel, the following procedure is used. An "increment" or "quotient" number is first calculated for each division. An increment equals the number of qualified jurors remaining in a division's qualified wheel divided by the number of jurors need from that division. For example, if the qualified wheel for the Atlanta division contains 16,500 names and 33 names are needed from that

division, the increment would be 16,500 divided by 33, or 500. The jury clerk then selects a "starting number," which is to be drawn at random from a drum or a wheel containing cards numbered from one to the increment number. Public notice is required to be posted both before and after the selection of starting numbers.

Once the increment and starting numbers have been chosen for each division, the jury clerk fills out "transmittal" forms which are delivered to the GSA. The GSA then picks, as the first name from each divisional wheel, the prospective juror whose position in the qualified wheel corresponds to the starting number picked by the clerk's office. Thereafter the computer selects each qualified juror whose position falls one increment number farther down the list, until the requisite number of jurors is obtained. For example, if the

increment for the Atlanta division is 500 and the starting number is 100, the persons on the qualified wheel at positions 100, 600, 1100, 1600 and so on would be chosen until 33 names are selected.

The persons selected from the computer are mailed a summons for jury service. They have an opportunity at that time to request an excusal from service on the basis of hardship or inconvenience. If such an excuse is granted, the GSA is notified so that it may enter the information on the computer tape. Persons permanently excused are removed from the qualified wheel, while those whose service is merely deferred remain in the wheel and are subject to being called for later service.

In addition to prescribing the procedures for local plans, the Act also sets out the exclusive methods by which

noncompliance may be challenged. 28 U.S.C.A. § 1867(e). For criminal cases, it provides for the dismissal of an indictment, following proper objection, upon a court's determination of a "substantial" failure to comply with the statutory procedures. 28 U.S.C.A. § 1867(a). A motion to dismiss must be filed together with a sworn statement "before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier."[3]

(1) This timeliness requirement was provided to prevent dilatoriness and to ensure the rapid disposition of claims, particularly those that are spurious. House Report, supra, at 1805. It is to be strictly construed, and failure to comply precisely with its terms

forecloses a challenge under the Act. See, e.g., United States v. Hawkins, 566 F.2d 1006 (5th Cir.), cert. denied, 439 U.S. 848, 99 S.Ct. 150, 58 L.Ed.2d 151 (1978); United States v. Kennedy, 548 F.2d 608 (5th Cir.), cert. denied, 434 U.S. 865, 98 S.Ct. 199, 54 L.Ed.2d 140 (1977); United States v. De Alba-Conrado, 481 F.2d 1266 (5th Cir. 1973). As this Court noted in Kennedy:

> In the Act, Congress set out a uniform, relatively strict scheme for jury selection. Congress included a new remedy for substantial violations of the Act, regardless of whether the litigant challenging the jury had been prejudiced by the jury selection. As a price for this remedy, Congress was entitled to exact strict compliance with formal procedural rules.

548 F.2d at 613.

With this background, we consider first the issue of timeliness and then the merits of the claims of noncompliance.

II. Timeliness

The Government contends that certain claims of the real estate defendants that were added after an original timely motion, and all claims of the garbage case defendants, who asserted the claims previously made by the real estate defendants, were not timely presented. It is therefore necessary to examine in detail the chronology of these claims. Since the Government does not challenge the timeliness of the claims of the individual defendants, we assume they were timely made.

1. Real Estate Defendants.

The real estate defendants were indicted on March 20, 1980. On July 17, the magistrate assigned to the case ordered them to file a motion to dismiss the indictment on the ground of noncompliance with the Act within three

weeks of the receipt of certain materials from the clerk's office. On August 18, the real estate defendants filed this motion which, in addition to alleging numerous violations of the Act and Local Plan, asserted various constitutional claims. The Government does not challenge the timeliness of this motion or the claims presented therein.

On December 8, the real estate defendants added further statutory and constitutional claims by amendment to their motion. The district court held the amendments timely only to the extent of the constitutional claims, and the Government does not challenge this holding.

The claims to which the Government does object for lack of timeliness were asserted in January 1981, in response to testimony by the jury clerk at the evidentiary hearing. The clerk

testified that rather than use a drum or wheel to select starting numbers for the drawing of grand jurors, she generally chose the numbers either out of her head or by flipping at random to page numbers in a book. She also admitted that she did not properly put up public notices of the starting number selection. The real estate defendants thereupon argued to the court that the methods by which the starting numbers were chosen as well as the lack of public notices were substantial violations of the Act and Local Plan, although these violations were not alleged in the written motion. Defendants apparently filed no formal motion or amendment to this effect.

In contending these claims were timely presented, defendants offer two arguments. They first contend their original motion filed in August generally raised the issue of improper

selection of starting numbers, which sufficiently included the post-hearing claims. Defendants alternatively argue that even if the claims were not adequately presented in the original motion, they did not and could not discover prior to the January hearing the facts underlying the claims.

In their August motion, defendants objected to the starting number selection solely on the ground the jury clerk chose the numbers from a drum which contained an array of cards numbered from 1 to 280, rather than an array numbered from 1 to the increment, as prescribed by the Local Plan. They claimed the failure to use the proper number of cards "effectively eliminated" a certain percentage of persons on the qualified wheels from being called for service. Defendants did not allege in this motion either that the jury clerk used methods

other than the drum to select starting numbers or that she failed to post public notice.[4]

Defendants' argument essentially is that if any claims of noncompliance are raised with respect to a particular aspect of the jury selection process, then any violations subsequently discovered at an evidentiary hearing relate back to the original motion for purposes of timeliness. There is no support for this contention either in the language or the legislative history of the Act.

The timeliness and sworn statement requirements of the Act provide that the motion to dismiss must state the "facts" and "grounds" on which the motion rests. 28 U.S.C.A. §§ 1867(a), (d). The purpose of these requirements is to allow the court to quickly assess the merits of the motion and to determine whether an

evidentiary hearing is warranted. House Report, supra, at 1805-06. If a hearing is ordered, the Act entitles defendants to "present in support of such motion the testimony of the . . . clerk, if available, any relevant records and papers not public or otherwise available used by the . . . clerk, and any other relevant evidence." 28 U.S.C.A. § 1867(d) (emphasis supplied). The Act, then, contemplates that the purpose of the hearing is to substantiate claims asserted in the motion and not to serve as a "fishing expedition" by defendants to uncover possible grounds for additional claims.

[2] Defendants are entitled to inspect jury records and other papers during the preparation of the motion and are given reasonable time to otherwise investigate possible violations. 28 U.S.C.A. § 1867(f). See also Government of Canal

Zone v. Davis, 592 F.2d 887 (5th Cir. 1979). Violations which are discovered or could have been discovered during this investigatory stage must be alleged in the motion and sworn statement, and failure to do so will preclude their assertion either at the evidentiary hearing or at any later point. Cf. United States v. Hawkins, 566 F.2d 1006 (5th Cir.), cert. denied, 439 U.S. 848, 99 S.Ct. 150, 58 L.Ed.2d 151 (1978); United States v. Kennedy, 548 F.2d 608 (5th Cir.), cert. denied, 434 U.S. 865, 98 S.Ct. 199, 54 L.Ed.2d 140 (1977).

Defendants admittedly did not discover during their investigation the facts underlying the allegedly improper methods of selecting starting numbers and the lack of public notice. The issue becomes whether they could have discovered these facts by the exercise of diligence. 28 U.S.C.A. § 1867(a).

Defendants' intensive investigation of grand jury practices began prior to indictment. They employed an investigator who conducted a "review of documents in the office of the clerk . . . and interviews [with] various employees of this court."[5] In addition, one of the defense attorneys spoke with the jury clerk in March 1980 with respect to the selection of starting numbers.[6] There is no indication either the attorney or the investigator asked the jury clerk or other employees whether any methods other than the drum were used to select starting numbers or whether public notices were properly posted.

Defendants rely heavily on the fact that during the meeting between the attorney and the jury clerk, the clerk at one point refused to answer any further questions, apparently because she became flustered and had been asked by the

Government attorneys not to speak with defense counsel unless they were present. Defendants fail to explain, however, why they could not have sought permission of the Government attorneys or of the court to continue the questioning, or why the other investigator could not have discovered the alleged violations.

Defendants had another opportunity to discover the alleged violations after their original motion was filed. In a prehearing brief filed by the Government on October 14 in response to defendants' motion, the Government stated:

> Defendants have contended . . . that the Jury Clerk did not determine the starting number from a sufficiently large range of numbers. That is, they claim that the numbers from which the starting number was selected were not as large as the quotient. This is not correct. However, there was a misapprehension on the part of the Jury Clerk as to how to select the starting number from among the numbers in the prescribed range. This fact

> was not discovered by the defendants, but by the United States in its review of procedures used in jury selection.[7]

This statement was made while a second investigation of jury procedures was underway, this time conducted by the real estate defendants in coordination with the garbage case defendants. Although the Government did not further describe what the "misapprehension" of the jury clerk was, defendants were at least put on notice of possible violations which they had not previously discovered. Thus, even though defendants may have been hampered by the jury clerk in the initial investigation, they have not fully explained their subsequent failure to determine the nature of the improprieties to which the Government referred.

[3] It appears doubtful, then, that defendants exercised diligence in

investigating and inquiring about the selection of starting numbers and the posting of notices. Nevertheless, because it is unclear from the record whether defendants were "misled or that needed information was withheld from them," see United States v. Geelan, 509 F.2d 737, 740 (8th Cir. 1974), cert. denied, 421 U.S. 999, 95 S.Ct. 2395, 44 L.Ed.2d 666 (1975), in an effort at judicial efficiency we go ahead and consider these claims on the merits in Section III.

2. Garbage Case Defendants.

The garbage case defendants were indicted on May 29, 1980. On June 5, the magistrate assigned to the case imposed a July 15 deadline for the filing of pretrial motions. Defendants did not file their jury challenge motion by this date.

At a July 22 hearing, the magistrate and counsel for the garbage case defendants discussed the ongoing investigation of the real estate defendants as well as the type of jury challenge motion counsel intended to file. Counsel did not seek access to jury records concurrent with the real estate defendants or otherwise engage in their own investigation, because they believed "it would have disrupted the process for us to go in there at the same time."[8] They instead intended to rely on the findings of the real estate defendants. Although the magistrate allowed counsel an additional two weeks to file their motion, this deadline also was not met.

The garbage case defendants finally filed their jury challenge motion on August 28. The motion was primarily a photocopy of the real estate defendants'

motion, which had been filed 10 days earlier. The magistrate later held a hearing requiring defendants to show cause why their August 28 filing was not in violation of the deadlines established for filing motions, but the magistrate never made a formal ruling on this issue.

In October, the garbage case and real estate defendants coordinated their investigatory efforts, which culminated in the previously mentioned December amendments to the original motions of both groups of defendants. The garbage case defendants also asserted after the January hearing claims based on the selection of starting numbers and the posting of notices. The Government objected to the timeliness of both the original and amended motions as well as the claims asserted after the January hearing.

The district court, finding the original motion did not strictly comply with the timeliness requirement of the Act, nevertheless held it had authority to entertain an out-of-time motion upon a showing of "reasonableness" or "exigent or compelling circumstances." 510 F.Supp. at 676. It then held the garbage case defendants reasonably delayed filing their motion until 10 days after the filing of the real estate defendants' motion, because prior to this time "all that [defendants] could have [filed] would be no more than a paper record, unsupported by factual averment." Id. The court also held the December amendments timely to the extent of the constitutional claims, a ruling not challenged by the Government, but did not address the timeliness of the January claims.

[4, 5] Although we doubt that under the statute the district court has the authority to excuse strict compliance with the time requirements of the Act on equitable grounds, we need not focus on that point. Even assuming the garbage case defendants could delay in reliance on the efforts of the real estate defendants, the ten-day delay in filing a motion after the real estate motion did not comply with the seven-day requirement of the Act. 28 U.S.C.A. § 1867(a). Where a defendant relies on a jury challenge motion filed by another defendant, the seven-day period provided in the Act for filing a motion begins to run from the date the defendant has knowledge or could have obtained knowledge of the earlier motion. See, United States v. Foxworth, 599 F.2d 1 (1st Cir. 1979); United States v. Greene, 489 F.2d 1145 (D.C.Cir. 1973), cert.

denied, 419 U.S. 977, 95 S.Ct. 239, 42 L.Ed.2d 190 (1974).

In Foxworth, the motion to dismiss pursuant to the Act was filed nine days after the indictment and eight days after appointment of defense counsel. Counsel had earlier filed a similar motion in another case. The First Circuit held that since the grounds for the motion were known to counsel at the time of his appointment, the eight-day delay in filing the motion exceeded the time limit established by section 1867(a). 599 F.2d at 3 n.3.

Greene is also analogous. In that case, the motion to dismiss was filed by the public defender in January 1972, on the day of trial. A similar motion had been filed in another criminal case in October 1971, by attorneys in the same public defender's office. The District of Columbia Circuit held the January

motion was untimely. Because the basis for the motion became known or could have become known to counsel at the time the earlier motion was filed, the seven-day period had expired. 489 F.2d at 1148. See also, United States v. Geelan, 509 F.2d 737 (8th Cir. 1974), cert. denied, 421 U.S. 999, 95 S.Ct. 2395, 44 L.Ed.2d 666 (1975) (motion filed 36 days after arraignment untimely, where basis for motion could have been discovered upon inquiry); United States v. Rickus, 351 F.Supp. 1386 (E.D.Pa. 1972), affirmed, 480 F.2d 919 (3rd Cir.), cert. denied, 414 U.S. 1006, 94 S.Ct. 365, 38 L.Ed.2d 243 (1973) (motion filed after voir dire of jury untimely where defense counsel could have investigated the matter earlier); United States v. Arnett, 342 F.Supp. 1255 (D.Mass. 1970) (motion filed 39 days after indictment untimely where defense counsel could have

discovered the alleged defects by looking at the local plan).

The garbage case defendants argue it was reasonable for them to spend ten days reviewing the real estate motion in order to decide whether to adopt it. That is not the point. Since defendants had already delayed the filing of a motion for several months to await the findings of the real estate defendants, they were required to exercise diligence in obtaining a copy of the real estate motion and acting upon it within seven days. Failure to do so forecloses a jury challenge under the Act. United States v. De Alba-Conrado, 481 F.2d 1266 (5th Cir. 1973).

As noted earlier, the seven-day time limit expressly provided in the Act was intended to be strictly enforced. Defendants' argument that it provides an insufficient amount of time to file a

jury challenge is best addressed to Congress, not to this Court. Cf. Harrison v. PPG Industries, 446 U.S. 578, 593, 100 S.Ct. 1889, 1898, 64 L.Ed.2d 525 (1980) (Where language and legislative history are clear, argument that statutory provision is unreasonable must be addressed to Congress).

[6] The remaining issue is the timeliness of the starting number and public notice claims, asserted by both the real estate and garbage case defendants after the January evidentiary hearing. While we held it was doubtful whether the real estate defendants exercised reasonable diligence in discovering these violations, it is clear the garbage case defendants exercised no diligence. Unlike the real estate defendants, the garbage case defendants cannot claim they were misled by the jury clerk or that information was

withheld from them, since they made absolutely no effort to investigate. Because of their lack of diligence, we hold the claims they asserted after the January hearing were untimely.

To summarize, we hold the real estate and individual defendants timely filed their motions to dismiss, but the garbage case defendants failed to timely present any of their claims. We also conclude the claims asserted by the real estate defendants following the January hearing should be reviewed on the merits, although we maintain serious doubt whether they were timely made.

III. The Merits

The violations alleged by the real estate defendants fall into four general categories: (1) improper methods by which starting numbers were selected; (2) failure to post public notice of

these selections; (3) erroneous excusals, exemptions and disqualifications of prospective jurors from the qualified jury wheels; and (4) erroneous permanent excusals by the jury clerk of jurors who had been summoned. The individual defendants assert all but the starting number and notice claims, since these improprieties were corrected prior to their indictment.

Before examining the alleged violations in detail, it is important to emphasize the standard under which they are reviewed. The Act, as noted previously, provides for the dismissal of an indictment only when there has been a substantial failure to comply with the statutory provisions in selecting the grand or petit jury. 28 U.S.C.A. § 1867(a). The word "substantial" was added by Congress to allow room for the doctrine of harmless error. House Report, supra, at 1805.

[7] Whether there has been a substantial failure to comply requires that the alleged violations be weighed against the underlying principles of the Act. United States v. Maskeny, 609 F.2d 183, 191 (5th Cir.), cert. denied, 447 U.S. 921, 100 S.Ct. 3010, 65 L.Ed.2d 1112 (1980); United States v. Davis, 546 F.2d 583, 589 (5th Cir.), cert. denied, 431 U.S. 906, 97 S.Ct. 1701, 52 L.Ed.2d 391 (1977). The legislative history states the Act embodies two important general principles:

> (1) random selection of juror names from the voter lists of the district or division in which court is held; and (2) determination of juror disqualifications, excuses, exemptions, and exclusions on the basis of objective criteria only. These principles provide the best method for obtaining jury lists that represent a cross section of the relevant community and for establishing an effective bulwark against impermissible forms of discrimination and arbitrariness.

House Report, supra, at 1793. A substantial violation of the Act will be

found only when these principles are frustrated. Mere "technical" deviations from the Act or even a number of them are insufficient. United States v. Davis, supra, 546 F.2d at 589; United States v. Evans, 526 F.2d 701, 706 (5th Cir.), cert. denied, 429 U.S. 818, 97 S.Ct. 62, 50 L.Ed.2d 78 (1976).

[8] The same analysis is applied for claims alleging a failure to comply with the Local Plan. The court must determine whether noncompliance with the Plan has resulted in a substantial violation of the Act and its underlying principles. See United States v. Rodriguez, 588 F.2d 1003, 1009 n.21 (5th Cir. 1979). See also United States v. Tarnowski, 429 F.Supp. 783, 788-89 (E.D.Mich. 1977), affirmed, 583 F.2d 903 (6th Cir. 1978), cert. denied, 440 U.S. 918, 99 S.Ct. 1238, 59 L.Ed.2d 468 (1979); United States v. Gurney, 393 F.Supp. 688, 701

(M.D.Fla. 1974). The mere claim the Plan has been violated is insufficient, absent a further showing the Act itself and its goals have been frustrated.

1. Starting Number Selection.

The Local Plan provides that starting numbers should be drawn by lot from a drum or box containing consequentively numbered cards covering the same range of numbers as the increment. Local Plan 90a. The jury clerk, however, rarely complied with this requirement, although she was given a "wheel" (drum) by the Clerk of Court and directed to use it. The jury clerk instead employed one of two methods. The first was the "book method," in which she would flip at "random" to a page in a dictionary and use the page number as the starting number. Beginning in 1976, she also used the so-called "Turner method," which

entailed picking a number out of her head. On several occasions, the jury clerk asked her assistant to pick a number out of his head.

[9] Defendants, of course, may challenge only improprieties affecting the particular grand jury which indicted them. Cf. United States v. Davis, 546 F.2d 583, 586 (5th Cir.), cert. denied, 431 U.S. 906, 97 S.Ct. 1701, 52 L.Ed.2d 391 (1977) (court may not reach challenge to system of using volunteer jurors where none were called in that case). The testimony of the jury clerk, however, was unclear on which method she used to select the starting numbers for the indicting grand jury. At one point, she said she was "certain" she used the book method, while at a later point she testified she predominantly used the Turner method during the period this grand jury was chosen. Because it appears

certain that one of the two was employed, we consider the validity of both.

The district court held the methods substantially violated the "random selection" requirement of the Act.[9] It first found they resulted in a statistically nonrandom selection of starting numbers, because a disproportionate percentage of numbers were in the lower range of the increment. For example, the 10 grand jury starting numbers chosen for the Atlanta Division during a two-year period were within the range of only 8% to 40% of the highest possible increment number. A statistically random method would have resulted in starting numbers spread over the entire increment range. In addition, since the jury clerk unintentionally favored certain numbers, there were several repeats of starting numbers that would not have occurred by the use of a completely random process.

The importance of this allegedly nonrandom selection was that the chances of qualified wheel members to be picked were not substantially equal. Evidence indicated that because of the concentration of starting numbers in the lower range and the repeat of certain numbers, some members of the wheel had less chance to be selected, particularly those at the very end of the wheel. The Government expert, however, testified that despite this initial effect, over the passage of time the likelihood that a particular juror would be chosen was approximately equal to that of any other person on the qualified wheel.

[10] Analysis of required randomness in a statistical sense misses the mark. The legislative history makes clear that Congress did not intend for "random selection" under the Act to be defined as "statistical randomness":

> [T]o the extent that the bill does provide for random selection, it does not insist upon randomness in the sense in which that term might be understood by statisticians. Many districts may seek the aid of statisticians in developing systems of selection that do meet the standards of that profession, and they are encouraged to do so. No doubt such systems enhance the likelihood of attaining the cross sectional goal of the bill. But for reasons of administrative feasibility your committee did not deem it necessary to require the use of random selection in the statistical sense. It is sufficient for the purpose of this legislation if the plan adopts some system of selection that affords no room for impermissible discrimination against individuals or groups.
>
> Thus, for example, the plan may specify selection of every 70th name from the voter list, or every name at the bottom of a page in the list, or all the names on the list, even though in certain cases statisticians might not agree that truly random selection would be the result. Likewise, in drawing names from the master and qualified jury wheels some similar processes may be designated. Under this definition of randomness, the plan may also permit courts to continue to use "rotation methods" or "jury pools" in assigning persons to grand and petit juries, provided that these methods, too, are free from any taint of impermissible discrimination against groups or individuals.

S.Rep. No. 891, 90th Cong., 1st Sess. 16

n.9 (1967). The underlying concern, then, is that the methods used must not result or have the potential to result in discrimination among cognizable groups of prospective jurors. While the methods used here by the jury clerk were "statistically nonrandom," there is no showing they were either allowed discriminatory selection of jurors or otherwise prevented jury panels from consisting of fair cross sections of the community. For example, in United States v. Blair, 493 F.Supp. 398, 410 (D.Md. 1980), defendants challenged the Clerk's practice of dropping excess names from the end of jury lists, which resulted in the exclusion of persons whose last names began with "X," "Y," and "Z." The court held this practice, while statistically nonrandom, did not exclude a cognizable group or result in an unrepresentative selection of jurors. Cf. United States

v. Smith, 588 F.2d 111 (5th Cir. 1979) (practice of putting back on the qualified jury wheel the names of persons who had served more than two years previously did not affect the inherently random nature of the selection process, because jury panels were still selected at random from a large group of persons, and did not frustrate the purposes of the Act).

The district court next held the methods used by the jury clerk created a "theoretical" possibility of abuse by permitting the jury clerk to nonrandomly designate one or more qualified jurors on a particular grand jury. According to this theory, if the jury clerk knew a particular person's position on the qualified wheel, she could deliberately choose a starting number out of her head or out of the book which would ensure the person would be selected by the computer

for service on the jury. For example, if she knew a person's position on the wheel was 600 and the increment was 500, the jury clerk could choose a starting number of 100 in order to guarantee that person's selection. The court noted that while "there is neither evidence nor even an allegation that [the jury clerk] or anyone else attempted to manipulate the system with this purpose in mind, . . . one cannot rule out the possibility for abuse in defeating random jury selection." 510 F.Supp. at 691.

We find the possibility of abuse to be not just "theoretical" but almost nonexistent. The crucial flaw in the theory is that it would have been practically impossible for the jury clerk or anyone else in the clerk's office to discover a person's position on the qualified wheel, particularly after a number of grand and petit juries had

been selected. Apparently no printout exists of persons on the qualified wheel. While the clerk's office does have individual computer cards for each person on the wheel, they are kept in a locked cabinet by the Clerk of Court and are not available to the jury clerk or other employees.

Even assuming access could be gained to the computer cards, it would still be extremely difficult to determine a person's position at a given point in time. There were over 30,000 separate computer cards representing persons on the qualified wheel. As wheel members were selected for jury service and their names removed, the relative positions of the remaining persons on the wheel changed. For example, if persons in positions 2 and 3 were selected, the wheel member in position 4 would be shifted to position 2, position 5 shifted

to position 3, and so on. Thus, in order to determine a person's present position on the wheel, it would be necessary to sort the 30,000 cards to reflect the removal of all previously-selected persons. If even a single card was out of order or was improperly included or excluded, the positions of the remaining persons would be miscalculated. Since approximately ninety grand and petit jury panels were chosen from the wheel prior to the jury which indicted defendants, the relative positions of the remaining qualified jurors obviously changed substantially from the original order of the wheel.

Defendants analogize this case to United States v. Kennedy, 548 F.2d 608 (5th Cir.), cert. denied, 434 U.S. 865, 98 S.Ct. 199, 54 L.Ed.2d 140 (1977), in which the jury clerk, to satisfy a deficiency in the number of prospective

jurors, sought volunteers from the list of persons who had served at the previous court term. This Court held the practice, which deviated from express statutory procedures, to be a substantial violation of the Act's "random selection" requirement.

In Kennedy, there was no question the practice resulted in the nonrandom selection of jurors because the jury clerk on an ad hoc basis directly contacted particular jurors who then were given complete discretion on whether to serve. Thus the pool from which the jurors came was itself selected, rather than randomly chosen. In the present case, the practices challenged created only the slim chance that particular jurors could be designated by the jury clerk. We cannot conclude this mere possibility frustrated the randomness principle of the Act.

We hold the jury clerk's methods of selecting starting numbers did not constitute a substantial violation of the Act. They do not comply with the Local Plan, however, and we take note the Government's statement that the practices have since been discontinued.

2. Posting of Public Notices.

Under the Local Plan, the clerk's office was required to post public notices on the clerk's bulletin board both before and after each drawing of starting numbers. The first notice was to provide the time and date of the drawings, which were open to the public, while the second notice was to indicate which numbers were selected as well as the date of the computer selection of names from the qualified wheel. The Plan has since been amended to eliminate the second notice requirement.

The jury clerk testified she rarely complied with the first notice requirement. On most occasions, she or her assistant posted both notices simultaneously only after the drawings. One one or two occasions, when pressed for time, the jury clerk posted no notices at all. On the infrequent times when prior notice was posted, the drawings were held only a few hours later. The drawings, however, were held in rooms open to the public. These practices continued despite instructions by the Clerk to post notices at the proper time.

As with the selection of starting numbers, it is unclear when the notices were posted with respect to the grand jury which indicted these particular defendants. It appears likely, however, the notices were not properly posted.

The failure to post notices violated both the Local Plan and the Act. While the Act does not expressly require public notice for starting number drawings, it does provide the selection of qualified jurors should be made publicly upon reasonable notice.[10]

The failure to provide public access to drawings, however, does not necessarily constitute a substantial violation of the Act. See United States v. Davis, 546 F.2d 583 (5th Cir.), cert. denied, 431 U.S. 906, 97 S.Ct. 1701, 52 L.Ed.2d 391 (1977); United States v. Dalton, 465 F.2d 32 (5th Cir.), cert. denied, 409 U.S. 1062, 93 S.Ct. 570, 34 L.Ed.2d 515 (1972). In Dalton, we held the selection of juror names in the clerk's office with only clerk personnel in attendance was not an invalid procedure, because, as here, the drawing took place in a room open to the public. 465 F.2d at 34.

Similarly, in Davis, the Court held the failure to provide public access to the computerized selection of jurors was not a substantial violation, because the practice in no way affected the random nature or objectivity of the selection process. 546 F.2d at 589. See also United States v. Huber, 457 F.Supp. 1221, 1230-31 (S.D.N.Y. 1978) (failure to publicly draw starting numbers was not a substantial violation).

[11] The district court held the lack of proper notice was a substantial violation because it "masked deviations" in the methods by which the jury clerk selected starting numbers. 510 F.Supp. at 694. It relied on dictum in Davis, supra, 546 F.2d at 589:

> If we were left in the dark about the procedures employed behind closed doors, or if we had reason to believe that there were any improprieties which had escaped detection as a result of non-public drawings, the result might be different.

> In such a case, of course, the concern would be not with the procedures themselves but rather with their effect on the random nature and objectivity of the selection.

As we held above in this case, however, the starting number methods used by the jury clerk, though not in compliance with the Local Plan, did not substantially affect the randomness or objectivity of the selection process. Moreover, the jury clerk testified the failure to post notices was the result of time pressures and was not an attempt to conceal the manner in which she chose starting numbers. This testimony was not disputed. We therefore conclude the lack of public notice here was not a substantial violation of the Act.

3. Erroneous Excusals, Exemptions and Disqualifications.

The Act provides the Local Plan shall specify grounds for excusal, exemption

and disqualification of prospective jurors. A person "disqualified" or "exempt" is automatically barred from jury service whether or not exclusion is requested.[11] A person "excused" from jury service, however, must request excusal to be relieved of the obligation to serve.[12]

The questionnaire sent to each person on the master wheel included a section listing the grounds for excusal, and instructed the recipient to "mark that excuse which applies to you if you demand to be excused for that reason" (emphasis in questionnaire). The questionnaire also sought information relevant to possible grounds for exemption or disqualification. Persons not excused, exempted, or disqualified were placed on the qualified wheels.

The qualified wheels at issue in this case were constructed beginning in mid-

1976. Questionnaires were sent to the 59,352 persons whose names were on the master wheel, and 42,105 completed forms were returned.

The jury clerk and her assistants screened the returned questionnaires to determine whether the persons should be included or excluded from the qualified wheels. 30,230 persons were ultimately placed on the qualified wheels. The remaining 11,875 were found to be either excused, exempted, or disqualified.

Based on an intensive review of the questionnaires, defendants alleged that 1,537 persons were erroneously excluded. The district court, after reviewing the disputed questinnaires, agreed that 495 persons had been improperly excluded. With respect to the remaining persons challenged, the court found that some were in fact properly excluded. It held it unnecessary to rule upon the others,

for reasons not clear from the opinion. 510 F.Supp. at 699 n.47.

The alleged erroneous exclusions were made on the basis of age, occupation, intradistrict moves, or prior jury service. We first consider whether these exclusions were in error and then determine whether, if so, they constitute a substantial violation of the Act.

Age. The Local Plan provides for excusal upon request of "all persons over 70 years of age at time of executing the jury qualification form." Local Plan 88. The district court found that 178 persons were improperly excused under this provision.[13] Of these, 135 aged 70 or over were excluded even though they had not requested excusal on their questionnaires. The remaining 43 had been excused even though they had not yet reached 70. Some of these persons

requested excusal on their questionnaires on the ground they were nearly 70, while others made no such indication. These age excusals apparently were the result of a misunderstanding by some clerk personnel that persons over 70 were to be excused regardless if they had requested it, and that persons nearly 70 were entitled to be excused.

With respect to the first group, the Government admits the clerk's office was in error. With respect to the second group, the Government argues it was a reasonable interpretation of the Plan to exclude persons who were nearly 70, since it was probable they would reach that age by the time they were called for service. We disagree. The Plan is explicit that only persons 70 at the time of executing the form could request excusal under this provision. It may not be improper under

the Plan, however, to permit persons who had turned 70 by the time they were summoned to seek at that point an excusal on the basis of age.

Occupation. The Plan provides for excusal upon request of "all actively practicing attorneys, physicians, dentists, and registered nurses," as well as "all ministers of the gospel and members of religious orders actively so engaged." Local Plan 87-88. It also provides for the exemption of military personnel, firemen, policemen, and public officers. Local Plan 88.

The district court held that at least 72 persons were wrongfully excluded from the qualified wheel by reason of their occupation. The majority of these persons were registered nurses who did not request excusal on that basis. The Government does not appear to dispute this finding of error.

Intradistrict Moves. Both the Act and Plan provide that persons may be qualified for jury service only if they have "resided for a period of one year within the judicial district." 28 U.S.C.A. § 1865(b)(1); Local Plan 89. The district court found the clerk's office erred in disqualifying 159 persons under this provision because they had moved from one division in the Northern District to another, even though they had remained within the district for at least one year despite these moves. In addition, 25 persons were found to be wrongfully excluded because of intradivisional moves. The Government does not dispute this latter finding.

Neither the Act nor the Plan provides for the disqualification of a person on the basis of an interdivisional move. See United States v. Rosenthal, 482

F.Supp. 867, 873 (M.D.Ga. 1979). A prospective juror is only required to reside within the district for a period of one year. If this requirement is satisfied, whether or not a person has moved among divisions within the district during the year is irrelevant. Moreover, there is no evidence of an operational problem for the computerized selection system in placing the name of a person who has moved on the qualified wheel of either the prior or present division of residence.

Prior Jury Service. The Local Plan provides excusal for "any person who has served as a grand or petit juror in a federal court during the past two years immediately preceding his call to serve." Local Plan 88 (emphasis supplied). The clerk personnel interpreted this provision to excuse persons who had served within two years

of the date of completing the questionnaires. The district court found that 61 persons had been wrongfully excluded on this basis. While the Government argues this practice of the clerk's office was understandable in light of the "difficulties" involved in constructing and maintaining the qualified wheels, it does not seriously argue these excusals complied with the Plan.

The district court, then, found a total of 495 wrongful exclusions in these four categories, and we uphold this finding. The issue remains whether the exclusions were a substantial violation of the Act.

[12] For wrongful exclusions, determining whether there has been a substantial violation has both quantitative and qualitative aspects. Quantitatively, a substantial violation generally will not be found if the number

of errors is small. House Report, supra, at 1805. Qualitatively, the inquiry is whether there has been a frustration of the Act's underlying principle of exclusions on the basis of objective criteria only. Id. at 1793. The application of extrastatutory, subjective criteria in the selection process in contravention of this principle may require a finding of a substantial violation even though the number of errors is relatively small. See United States v. Evans, 526 F.2d 701 (5th Cir.), cert. denied, 429 U.S. 818, 97 S.Ct. 62, 50 L.Ed.2d 78 (1976).

[13] With respect to the quantitative aspect, the number of errors found in the present case is insignificant in relation to the large number of prospective jurors handled by the clerk's office. The persons wrongfully excluded comprised only 1.2% of those

screened by the clerk personnel, and only 1.6% of those placed on the qualified wheels.[14] Thus, the pool of available jurors would have increased only slightly if these errors had not been made. Compare United States v. Evans, 526 F.2d 701 (5th Cir.), cert. denied, 429 U.S. 818, 97 S.Ct. 62, 50 L.Ed.2d 78 (1976) (small number of wrongful inclusions and exclusions of persons from qualified wheel is not substantial violation); United States v. Rosenthal, 482 F.Supp. 867 (M.D.Ga. 1979) (small number of persons wrongfully excused for intradistrict moves is insubstantial); United States v. Armsbury, 408 F.Supp. 1130 (D.Ore. 1976) (wrongful inclusion of 153 persons on a qualified jury wheel numbering 2,705, a 5.6% error rate, is not a substantial violation); United States v. Matthews, 350 F.Supp. 1103 (D.Del. 1972) (wrongful excusal of 17

persons out of 2,400 on the master wheel, or a .7% error rate, is insubstantial), with United States v. Hill, 480 F.Supp. 1223 (S.D.Fla. 1979) (excusal by clerk of 31 of 77 grand jurors called, or 40.3%, which left only 46 persons from which to pick a grand jury of 23, resulted in a substantial violation of the Act where done without authorization or knowledge of judge). See also House Report, supra, at 1805 (example of harmless error would be use of 1,990 names on master jury wheel where plan calls for 2,000, or .5% error rate). Given the time pressure involved and the limited personnel available to construct the qualified wheels, we hold the number of errors made in this case did not in itself substantially violate the Act.

As to the qualitative aspect, the district court held the wrongful exclusions were a substantial violation

of the Act because they were made on the basis of "subjective, nonstatutory" criteria. 510 F.Supp. at 699-701. The court reasoned essentially that exclusions resulting from a misinterpretation of the criteria set forth in the Act and Plan violate the underlying principle which calls for the use of objective criteria only.

A review of the legislative history indicates the district court misconstrued the principle of objectivity. The subjective criteria Congress intended to prohibit in the Act including such notions as "good character, approved integrity, sound judgment and fair education." House Report, supra, at 1795. The problem recognized with their use was that "[i]n at least some instances, even though the jury selection officials were well intentioned, these additional

qualification requirements have produced discriminatory results, especially in relation to the poor and other minorities." Id. Accordingly, the Act provides for the use of only objective criteria to determine whether a person is qualified or should instead be deemed disqualified, excused or exempted.

[14] The subjective criteria contemplated and rejected by the Act, then, are those which, intentionally nor not, result or are likely to result in discrimination or which fail to produce juries representing a fair cross section of the community. House Report, supra, at 1795. The mere misinterpretation or misapplication of the objective criteria by a clerk's office does not violate the objectivity principle, in the absence of a discriminatory potential or effect. See United States v. Evans, 526 F.2d 701, 706 (5th Cir.), cert. denied, 429 U.S.

818, 97 S.Ct. 62, 50 L.Ed.2d 78 (1976); United States v. Gurney, 393 F.Supp. 688, 701-05 (M.D.Fla. 1974).

While the clerk personnel in this case made a number of erroneous exclusions, there is no showing they were based on subjective criteria reflecting either a discriminatory intent or effect. The errors, made in good faith, were instead the result of an occasional misinterpretation or misapplication of technical statutory criteria. In these circumstances, we cannot say the errors contravened the principle of objectivity or otherwise constituted a substantial violation of the Act.

In finding such a violation, the court also emphasized the exclusions were made by the clerk's office without proper consultation with or approval by a district court judge. Under the Act and Plan, ultimate authority over qualifications lies with the judges:

> The chief judge of the district court, or such other district court judge as the plan may provide, on his initiative or upon recommendation of the clerk ..., shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for, or exempt, or to be excused from jury service.

28 U.S.C.A. § 1865(a); Local Plan 88. The extent to which the district court judges were consulted by the clerk's office during the qualification process is disputed by the parties, although it appears the clerk personnel handled most of the determinations of whether particular jurors were qualified.

The delegation to the clerk's office of initial authority to make qualification decisions has generally not been considered a substantial violation of the Act. See, e.g., United States v. Maskeny, 609 F.2d 183, 193-94 (5th Cir.), cert. denied, 447 U.S. 921, 100 S.Ct. 3010, 65 L.Ed.2d 1112 (1980); United

States v. Evans, 526 F.2d 701, 706 (5th Cir.), cert. denied, 429 U.S. 818, 97 S.Ct. 62, 50 L.Ed.2d 78 (1976); United States v. Jenison, 485 F.Supp. 655, 667-68 (S.D.Fla. 1979); United States v. Huber, 457 F.Supp. 1221, 1231 (S.D.N.Y. 1978). Cf. United States v. Davis, 546 F.2d 583, 590-92 (5th Cir.), cert. denied, 431 U.S. 906, 97 S.Ct. 1701, 52 L.Ed.2d 391 (1977) (delegation to the GSA the role of selecting jurors by use of the computer is not a substantial violation). While the clerk personnel should have consulted the judges and the Clerk of Court more closely when uncertainties arose with particular jurors or the general criteria to be used, the failure to do so, either in itself or when combined with the erroneous exclusions, does not warrant dismissal of the indictments.

4. Erroneous Permanent Excusals by Jury Clerk After Summoning.

Defendants challenged the practice of granting permanent excusals to persons summoned for jury service, rather than temporary excusals as contemplated by the Act and Local Plan. The evidence revealed the following:

From 1978 to February 1980, 10 grand juries were empaneled in the Northern District. 445 persons on the qualified wheels were served with summonses to report for service on these juries. Of these, 141 were excused by the clerk's office prior to reporting, with all but 3 receiving permanent excusals. Most were excused on "hardship" grounds. Defendants challenged the permanent excusal of 74 of these jurors.

In addition, the jury clerk permanently excused from jury service 74 persons who had been excused in court by the district judge, regardless of the

reason for their excusal by the judge. The court found that some of these persons had been excused in court merely because they were "surplus" jurors, while others had been excused because of hardship.

The jury clerk testified she had granted permanent excusals because she did not believe that temporary excusals could be accommodated. Later testimony, however, indicated the GSA computer could have adequately handled the information. The jury clerk's practice did not comply with the Act.

The Act provides that any person summoned for jury service may be "excused by the court, upon a showing of undue hardship or extreme inconvenience, for such period as the court deems necessary, at the conclusion of which such person shall be summoned again for jury service." 28 U.S.C.A. § 1866(c)

(emphasis supplied).[15] The legislative history and case law make clear that an excusal under this provision should be temporary where possible, and that the prospective juror must serve as soon as the hardship or inconvenience terminates. United States v. Kennedy, 548 F.2d 608, 612 n.6 (5th Cir.), cert. denied, 434 U.S. 865, 98 S.Ct. 199, 54 L.Ed.2d 140 (1977). See also House Report, supra, at 1804.

[15] Nevertheless, while the practice of granting permanent rather than temporary excusals failed to comply with the technical requirements of the Act, it did not rise to the level of a substantial violation. Even assuming all 212 permanent excusals were wrongful, this amounts to only .7% of the persons on the qualified wheels, an insignificant amount.[16] Moreover, there is no evidence indicating the excusals

were made on the basis of improper subjective criteria. We therefore hold the district court erred in finding this practice to be a substantial violation.

CONCLUSION

As the district court accurately noted, this case "represents perhaps the most intensive and far reaching challenge of the administration of a federal judicial district jury plan since the adoption of the Jury Selection and Service Act 13 years ago." 510 F.Supp. at 705. We find it significant, however, that after months of intensive and no doubt extremely costly investigation into the practices of the clerk's office, a relatively small number of errors was uncovered. Of more than 40,000 questionnaires screened by the clerk personnel in a short period of time, the district court found only about 500 were erroneously treated. Moreover,

while the jury clerk failed to follow the Act and Local Plan precisely with respect to selecting starting numbers and posting notices, there has been absolutely no indication these errors affected the randomness of the juries within the meaning of the Act.

In sorting out the details of statutory procedures, there is perhaps a tendency to lose sight of the fundamental purpose of the law. The purpose of the Act is to prevent discrimination, whether it be on account of "race, color, religion, sex, national origin, or economic status." 28 U.S.C.A. § 1862. Where the procedural errors made by those in charge of selecting juries do not raise the possibility of frustrating this goal, a court should be hesitant to order the drastic remedy of the dismissal of indictments.

The clerk's office in this case committed errors. We do not condone them and have sought to make clear in this opinion the practices which do not comply with the statutory and plan requirements. It is assumed the practices have been or will be corrected. After reviewing the voluminous evidence and considering the arguments of counsel, however, it simply does not appear the violations established here seriously frustrated the underlying principles of the Act. The dismissal of the indictments must be reversed.

Because the district court decided this case on the basis of statutory violations, it did not reach the constitutional questions presented. We therefore remand for consideration of these issues.

REVERSED AND REMANDED.

* Former Fifth Circuit Case, Section 9(1) of Public Law 96-452--October 14, 1980.

1. The Act provides:

> If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the grand jury, the court shall stay the proceedings pending the selection of a grand jury in conformity with this title or dismiss the indictment, whichever is appropriate.
>
> 28 U.S.C.A. § 1867(d).

2. The Act provides:

> Each United States district court shall devise and place into operation a written plan for random selection of grand and petit jurors that shall be designed to achieve the objectives of sections 1861 and 1862 of this title, and that shall otherwise comply with the provisions of this title. The plan shall be placed into operation after approval by a reviewing panel consisting of the members of the judicial council of the circuit and either the chief judge of the district whose plan is being reviewed or such other active district judge of that district as the chief judge of the district may designate. The panel shall examine the plan to ascertain that it complies with the provisions of this title. If the reviewing panel finds that the plan does not comply, the panel shall state the

particulars in which the plan fails to comply and direct the district court to present within a reasonable time an alternative plan remedying the defect or defects. Separate plans may be adopted for each division or combination of divisions within a judicial district. The district court may modify a plan at any time and it shall modify the plan when so directed by the reviewing panel. The district court shall promptly notify the panel, the Administrative Office of the United States Courts, and the Attorney General of the United States, of the initial adoption and future modifications of the plan by filing copies therewith. Modifications of the plan made at the instance of the district court shall become effective after approval by the panel.

28 U.S.C.A. § 1863(a).

3. The Act also provides for enforcement by the Attorney General in criminal cases and by either party in civil cases:

(b) In criminal cases, before the voir dire examination begins, or within seven days after the Attorney General of the United States discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the Attorney General may move to dismiss the indictment or stay the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

(c) In civil cases, before the voir dire examination begins, or within seven days after the party discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, any party may move to stay the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the petit jury.

28 U.S.C.A. §§ 1867(b), (c).

4. Defendants' claim was in pertinent part as follows:

A violation of the Selection Plan and the Act has repeatedly occurred in this district through the jury clerk's failure to draw starting numbers as prescribed by the Selection Plan. Instead of drawing a starting number for each division by lot from an array of consecutive numbers ending with the appropriate quotient, the clerk altered the process by selecting a number from a smaller range, namely 1 through 280, inclusive.... In other words, with respect to the Atlanta Division, the clerk selected a starting number from an array of 1 to 280 rather than an array of 1 to 475.

The result of this erroneous application of the Selection Plan is a systematic omission of eligible grand jurors from the possibility of selection. Under the system presently applied by the jury clerk, a prospective juror whose position in the qualified jury wheel is a multiple of one of the numbers omitted from the array

from which the starting number was selected cannot be chosen for grand jury duty.

Memorandum in Support of Motion to Dismiss, Vol. 21 at 827.

5. Affidavit of Don C. Huprich, Vol. 21 at 847.

6. Affidavit of William W. Maycock, Vol. 21 at 865-66. The affidavit states in relevant part:

> On March 27, 1980, I spoke with Angela Turner, Jury Clerk of the Atlanta Division of the United States District Court for the Northern District of Georgia in her office at the Richard B. Russell Building in Atlanta. Mrs. Turner told me that she was the individual who drew the juror selection starting number from a drum containing numbered cards. I asked her how many cards were contained in the selection drum. She stated that there were about 350 numbers in the drum to her knowledge. In response to my inquiry about how she avoided drawing or selecting numbers larger than the selection quotient calculated for the selection of jurors for a grand jury, she stated that the situation had only occurred once and that the problem had been solved. I understood her to mean that she resolved the possibility of drawing a starting number larger than the grand jury selection quotient by removing a significant number of cards from the drum. Although I made additional inquiries to Mrs. Turner on the subject, she refused to make further comment.

7. Brief in Response to Defendants' Motion to Dismiss, Vol. 21 at 1020 (footnote omitted).

8. Transcript Vol. 11 at 111-12.

9. The Act provides:

> (a) The jury commission, or in the absence thereof the clerk, shall maintain a qualified jury wheel and shall place such wheel names of all persons drawn from the master jury wheel who are determined to be qualified as jurors and not exempt or excused pursuant to the district court plan. From time to time, the jury commission or the clerk shall publicly draw at random from the qualified jury wheel such number of names of persons as may be required for assignment to grand and petit jury panels. The jury commission or the clerk shall prepare a separate list of names of persons assigned to each grand and petit jury panel.
>
> 28 U.S.C.A. § 1866(a) (emphasis supplied). See also 28 U.S.C.A. § 1864(a) (requirement of random selection of names from master wheel).

10. 28 U.S.C.A. § 1866(a). "Publicly draw" is defined as

> . . . a drawing which is conducted within the district after reasonable public notice and which is open to the public at large under the supervision of the clerk or jury commission, except that when a drawing is made by means of electronic data processing, "publicly draw" shall mean a

drawing which is conducted at a data processing center located in or out of the district, after reasonable public notice given in the district for which juror names are being drawn, and which is open to the public at large under such supervision of the clerk or jury commission as the Judicial Conference of the United States shall by regulation require ....

28 U.S.C.A. § 1869(k).

11. A person is "disqualified" from jury service if he

(1) is not a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district;
(2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;
(3) is unable to speak the English language;
(4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or
(5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored.

28 U.S.C.A. § 1865(b).
The category of exempt persons includes:

> (i) members in active service in the Armed Forces of the United States;
> (ii) members of the fire or police departments of any State, district, territory, possession, or subdivision thereof;
> (iii) public officers in the executive, legislative, or judicial branches of the Government ....

28 U.S.C.A. § 1863(b)(6); Local Plan 88. Although the Local Plan could have provided for the exemption of additional groups of persons upon a finding it would be in the public interest and not inconsistent with the Act, see 28 U.S.C.A. § 1863(b)(6), the Northern District elected to adopt only the exemptions provided in the Act.

12. Pursuant to 28 U.S.C.A. § 1863(b)(5), the Local Plan provides excusals for:

> (1) all ministers of the gospel and members of religious orders actively so engaged;
> (2) all actively practicing attorneys, physicians, dentists, and registered nurses;
> (3) any person who has served as a grand or petit juror in a federal court during the past two years immediately preceding his call to serve;
> (4) persons having active care and custody of a child or children under 10 years of age whose health and/or safety would be jeopardized by their absence for jury service;
> (5) a person who is essential to the care of aged or infirm persons; and

(6) all persons over 70 years of age at time of executing the jury qualification form.

Local Plan 88.

13. The district court opinion actually states 188 persons rather than 178 were improperly excused on this basis. 510 F.Supp. at 697. The context in which this figure appears as well as the evidence, however, indicates the 188 was a typographical error.

14. The exact percentages are as follows:

(1) Percentage of qualified jurors 495 / 30,230 = .01637, or approximately 1.64%
(2) Percentage of screened questionnaires 495 / 42,105 = .01175, or approximately 1.18%

15. "Undue hardship or extreme inconvenience" is defined in the Act as

. . . great distance, either in miles or traveltime, from the place of holding court, grave illness in the family or any other emergency which outweighs in immediacy and urgency the obligation to serve as a juror when summoned, or any other factor which the court determines to constitute an undue hardship or to create an extreme inconvenience to the juror; and in addition, in situations where it is anticipated that a trial or grand jury proceeding may require more than thirty days of service, the court may consider, as a further basis for

temporary excuse, severe economic hardship to an employer which would result from the absence of a key employee during the period of such service ....

28 U.S.C.A. § 1869(j).

16. See Slip op. pp. 12441-12442, pp. ____ - ____ supra.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*
UNIT B

NO. 81-7285

UNITED STATES of America,
Plaintiff-Appellant,

v.

NORTHSIDE REALTY ASSOCIATES, INC.; Barton & Ludwig, Inc.; Harry Norman & Associates, Inc.; Clover Realty Co.; Edwin A. Isakson; Chandler B. Barton; and Harry Norman, Jr.,
Defendants-Appellees.

Appeal from the
United States District Court for the
Northern District of Georgia

- - - - - - - - - - - -

ON PETITIONS FOR REHEARING AND
SUGGESTIONS FOR REHEARING EN BANC

(Opinion October 19, 1981, 5 Cir., 198__, _____ F.2d _____).

Before RONEY, VANCE and RANDALL, Circuit Judges.

PER CURIAM:

The Petitions for Rehearing are DENIED and no member of this panel nor Judge of

this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16, Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/S/
Paul H. Roney
United States Circuit Judge

* Former Fifth Circuit Case (Section 9(1) of Public Law 96-452 -- October 14, 1980).

STATUTE

Jury Selection and Service Act of 1968
28 U.S.C. §§1861-63, 1865-67, 1869(k):

§1861. Declaration of policy

It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

§1862. Discrimination prohibited

No citizen shall be excluded from service

as a grand or petit juror in the district courts of the United States or in the Court of International Trade on account of race, color, religion, sex, national origin, or economic status.

§1863. Plan for random jury selection

(a) Each United States district court shall devise and place into operation a written plan for random selection of grand and petit jurors that shall be designed to achieve the objectives of sections 1861 and 1862 of this title [28 USCS §§1861, 1862], and that shall otherwise comply with the provisions of this title. The plan shall be placed into operation after approval by a reviewing panel consisting of the members of the judicial council of the circuit and either the chief judge of the district whose plan is being reviewed or such other active district judge of that

district as the chief judge of the district may designate. The panel shall examine the plan to ascertain that it complies with the provisions of this title. If the reviewing panel finds that the plan does not comply, the panel shall state the particulars in which the plan fails to comply and direct the district court to present within a reasonable time an alternative plan remedying the defect or defects. Separate plans may be adopted for each division or combination of divisions within a judicial district. The district court may modify a plan at any time and it shall modify the plan when so directed by the reviewing panel. The district court shall promptly notify the panel, the Administrative Office of the United States Courts, and the Attorney General of the United States, of the initial adoption and future modifications of the plan by filing

copies therewith. Modifications of the plan made at the instance of the district court shall become effective after approval by the panel. Each district court shall submit a report on the jury selection process within its jurisdiction to the Administrative Office of the United States Courts in such form and at such times as the Judicial Conference of the United States may specify. The Judicial Conference of the United States may, from time to time, adopt rules and regulations governing the provisions and the operation of the plans formulated under this title.

(b) Among other things, such plan shall ----

(1) either establish a jury commission, or authorize the clerk of the court, to manage the jury selection process. If the plan establishes a jury

commission, the district court shall appoint one citizen to serve with the clerk of the court as the jury commission: Provided, however, That the plan for the District of Columbia may establish a jury commission consisting of three citizens. The citizen jury commissioner shall not belong to the same political party as the clerk serving with him. The clerk or the jury commission, as the case may be, shall act under the supervision and control of the chief judge of the district court or such other judge of the district court as the plan may provide. Each jury commissioner shall, during his tenure in office, reside in

the judicial district or division for which he is appointed. Each citizen jury commissioner shall receive compensation to be fixed by the district court plan at a rate not to exceed $50 per day for each day necessarily employed in the performance of his duties, plus reimbursement for travel, subsistence, and other necessary expenses incurred by him in the performance of such duties. The Judicial Conference of the United States may establish standards for allowance of travel, subsistence, and other necessary expenses incurred by jury commissioners.

(2) specify whether the names of prospective jurors shall be

selected from the voter registration lists or the lists of actual voters of the political subdivisions within the district or division. The plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of this title [28 USCS §§1861, 1862]. The plan for the District of Columbia may require the names of prospective jurors to be selected from the city directory rather than from voter lists. The plans for the districts of Puerto Rico and the Canal Zone may prescribe some other source or sources

of names of prospective jurors in lieu of voter lists, the use of which shall be consistent with the policies declared and rights secured by sections 1861 and 1862 of this title [28 USCS §§1861, 1862].

(3) specify detailed procedures to be followed by the jury commission or clerk in selecting names from the sources specified in paragraph (2) of this subsection. These procedures shall be designed to ensure the random selection of a fair cross section of the persons residing in the community in the district or division wherein the court convenes. They shall ensure that names of persons residing in each of the counties,

parishes, or similar political subdivisions within the judicial district or division are placed in a master jury wheel; and shall ensure that each county, parish, or similar political subdivision within the district or division is substantially proportionally represented in the master jury wheel for that judicial district, division, or combination of divisions. For the purposes of determining proportional representation in the master jury wheel, either the number of actual voters at the last general election in each county, parish, or similar political subdivision, or the number of registered voters if

registration of voters is uniformly required throughout the district or division, may be used.

(4) provide for a master jury wheel (or a device similar in purpose and function) into which the names of those randomly selected shall be placed. The plan shall fix a minimum number of names to be placed initially in the master jury wheel, which shall be at least one-half of 1 per centum of the total number of persons on the lists used as a source of names for the district or division; but if this number of names is believed to be cumbersome and unnecessary, the plan may fix a smaller number of names to be placed in

the master wheel, but in no event less than one thousand. The chief judge of the district court, or such other district court judge as the plan may provide, may order additional names to be placed in the master jury wheel from time to time as necessary. The plan shall provide for periodic emptying and refilling of the master jury wheel at specified times, the interval for which shall not exceed four years.

(5) specify those groups of persons or occupational classes whose members shall, on individual request therefor, be excused from jury service. Such groups or classes shall be excused only

if the district court finds, and the plan states, that jury service by such class or group would entail undue hardship or extreme inconvenience to the members thereof, and excuse of members thereof would not be inconsistent with sections 1861 and 1862 of this title [28 USCS §§1861, 1862].

(6) specify those groups of persons or occupational classes whose members shall be barred from jury service on the ground that they are exempt. Such groups or classes shall be exempt only if the district court finds, and the plan states, that their exemption is in the public interest and would not be inconsistent with sections

1861 and 1862 of this title [28 USCS §§1861, 1862]. The plan shall provide for exemption of the following persons: (i) members in active service in the Armed Forces of the United States; (ii) members of the fire or police departments of any State, district, territory, possession, or subdivision thereof; (iii) public officers in the executive, legislative, or judicial branches of the Government of the United States, or any State, district, territory, or possession or subdivision thereof, who are actively engaged in the performance of official duties.

(7) fix the time when the names drawn from the qualified jury wheel shall be disclosed to parties and to the public. If the plan permits these names to be made public, it may nevertheless permit the chief judge of the district court, or such other district court judge as the plan may provide, to keep these names confidential in any case where the interests of justice so require.

(8) specify the procedures to be followed by the clerk or jury commission in assigning persons whose names have been drawn from the qualified jury wheel to grand and petit jury panels.

(c) The initial plan shall be devised by each district court and transmitted to the reviewing panel specified in subsection (a) of this section within one hundred and twenty days of the date of enactment of the Jury Selection and Service Act of 1968 [Mar. 27, 1968]. The panel shall approve or direct the modification of each plan so submitted within sixty days thereafter. Each plan or modification made at the direction of the panel shall become effective after approval at such time thereafter as the panel directs, in no event to exceed ninety days from the date of approval. Modifications made at the instance of the district court under subsection (a) of this section shall be effective at such time thereafter as the panel directs, in no event to exceed ninety days from the date of modification.

(d) State, local, and Federal officials having custody, possession, or control of voter registration lists, lists of actual voters, or other appropriate records shall make such lists and records available to the jury commission or clerks for inspection, reproduction, and copying at all reasonable times as the commission or clerk may deem necessary and proper for the performance of duties under this title. The district courts shall have jurisdiction upon application by the Attorney General of the United States to compel compliance with this subsection by appropriate process.

§1865. Qualifications for jury service

(a) The chief judge of the district court, or such other district court judge as the plan may provide, on his initiative or upon recommendation of

the clerk or jury commission, shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for, or exempt, or to be excused from jury service. The clerk shall enter such determination in the space provided on the juror qualification form and the alphabetical list of names drawn from the master jury wheel. If a person did not appear in response to a summons, such fact shall be noted on said list.

(b) In making such determination the chief judge of the district court, or such other district court judge as the plan may provide, shall deem any person qualified to serve on grand and petit juries in the district court unless he---

(1) is not a citizen of the United States eighteen years old who has resided for a period of one

year within the judicial district;

(2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;

(3) is unable to speak the English language;

(4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or

(5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored.

§1866. Selection and summoning of jury panels

(a) The jury commission, or in the absence thereof the clerk, shall maintain a qualified jury wheel and shall place in such wheel names of all persons drawn from the master jury wheel who are determined to be qualified as jurors and not exempt or excused pursuant to the district court plan. From time to time, the jury commission or the clerk shall publicly draw at random from the qualified jury wheel such number of names of persons as may be required for assignment to grand and petit jury panels. The jury commission or the clerk shall prepare a separate list of names of persons assigned to each grand and petit jury panel.

(b) When the court orders a grand or petit jury to be drawn, the clerk or jury commission or their duly designated deputies shall issue summonses for the required number of jurors.

Each person drawn for jury service may be served personally, or by registered or certified mail addressed to such person at his usual residence or business address.

If such service is made personally, the summons shall be delivered by the clerk or the jury commission or their duly designated deputies to the marshal who shall make such service.

If such service is made by registered or certified mail, the summons may be served by the clerk or jury commission or their duly designated deputies who shall make affidavit of service and shall file with such affidavit the addressee's receipt for the registered or certified summons. If such service is made by the marshal, he shall attach to his return the addressee's receipt for the registered or certified mail.

(c) Except as provided in section 1865 of this title or in any jury selection plan provision adopted pursuant to paragraph (5) or (6) of section 1863(b) of this title [28 USCS §1863(b)], no person or class of persons shall be disqualified, excluded, excused, or exempt from service as jurors: Provided, That any person summoned for jury service may be (1) excused by the court, upon a showing of undue hardship or extreme inconvenience, for such period as the court deems necessary, at the conclusion of which such person shall be summoned again for jury service under subsections (b) and (c) of this section, or (2) excluded by the court on the ground that such person may be unable to render impartial jury service or that his service as a juror would be likely to disrupt the proceedings, or (3) excluded upon

peremptory challenge as provided by law, (4) excluded pursuant to the procedure specified by law upon a challenge by any party for good cause shown, or (5) excluded upon determination by the court that his service as a juror would be likely to threaten the secrecy of the proceedings, or otherwise adversely affect the integrity of jury deliberations. No person shall be excluded under clause (5) of this subsection unless the judge, in open court, determines that such is warranted and that exclusion of the person will not be inconsistent with sections 1861 and 1862 of this title [28 USCS §§1861, 1862]. The number of persons excluded under clause (5) of this subsection, together with detailed explanations for the exclusions, shall be forwarded immediately to the judicial council of the circuit, which shall have the power

to make any appropriate order, prospective or retroactive, to redress any misapplication of clause (5) of this subsection, but otherwise exclusions effectuated under such clause shall not be subject to challenge under the provisions of this title. Any person excluded from a particular jury under clause (2), (3), or (4) of this subsection shall be eligible to sit on another jury if the basis for his initial exclusion would not be relevant to his ability to serve on such other jury.

(d) Whenever a person is disqualified, excused, exempt, or excluded from jury service, the jury commission or clerk shall note in the space provided on his juror qualification form or on the juror's card drawn from the qualified jury wheel the specific reason therefor.

(e) In any two-year period, no person shall be required to (1) serve or attend court for prospective service as a petit juror for a total of more than thirty days, except when necessary to complete service in a particular case, or (2) serve on more than one grand jury, or (3) serve as both a grand and petit juror.

(f) When there is an unanticipated shortage of available petit jurors drawn from the qualified jury wheel, the court may require the marshal to summon a sufficient number of petit jurors selected at random from the voter registration lists, lists of actual voters, or other lists specified in the plan, in a manner ordered by the court consistent with sections 1861 and 1862 of this title [28 USCS §§1861, 1862].

(g) Any person summoned for jury service who fails to appear as directed

shall be ordered by the district court to appear forthwith and show cause for his failure to comply with the summons. Any person who fails to show good cause for noncompliance with a summons may be fined not more than $100 or imprisoned not more than three days, or both.

§1867. Challenging compliance with selection procedures

(a) In criminal cases, before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

(b) In criminal cases, before the voir dire examination begins, or within seven days after the Attorney General of the United States discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the Attorney General may move to dismiss the indictment or stay the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

(c) In civil cases, before the voir dire examination begins, or within seven days after the party discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, any party may move to stay the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the petit jury.

(d) Upon motion filed under subsection (a), (b), or (c) of this section, containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with the provisions of this title, the moving party shall be entitled to present in support of such motion the testimony of the jury commission or clerk, if available, any relevant records and papers not public or otherwise available used by the jury commissioner or clerk, and any other relevant evidence. If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the grand jury, the court shall stay the proceedings pending the selection of a grand jury in conformity with this title or dismiss the indictment, whichever is appropriate. If the court determines that there has been a substantial failure

to comply with the provisions of this title in selecting the petit jury, the court shall stay the proceedings pending the selection of a petit jury in conformity with this title [28 USCS §1867].

(e) The procedures prescribed by this section shall be the exclusive means by which a person accused of a Federal crime, the Attorney General of the United States or a party in a civil case may challenge any jury on the ground that such jury was not selected in conformity with the provisions of this title. Nothing in this section shall preclude any person or the United States from pursuing any other remedy, civil or criminal, which may be available for the vindication or enforcement of any law prohibiting discrimination on account of race, color, religion, sex, national origin or economic status in the

selection of persons for service on grand or petit juries.

(f) The contents of records or papers used by the jury commission or clerk in connection with the jury selection process shall not be disclosed, except pursuant to the district court plan or as may be necessary in the preparation or presentation of a motion under subsection (a), (b), or (c) of this section, until after the master jury wheel has been emptied and refilled pursuant to section 1863(b)(4) of this title [28 USCS §1863(b)], and all persons selected to serve as jurors before the master wheel was emptied have completed such service. The parties in a case shall be allowed to inspect, reproduce, and copy such records or papers at all reasonable times during the preparation and pendency of such a motion. Any

person who discloses the contents of any record or paper in violation of this subsection may be fined not more than $1,000 or imprisoned not more than one year, or both.

§1869. Definitions

* * *

(k) "publicly draw", as referred to in sections 1864 and 1866 of this chapter [28 USCS §§1864 and 1866], shall mean a drawing which is conducted within the district after reasonable public notice and which is open to the public at large under the supervision of the clerk or jury commission, except that when a drawing is made by means of electronic data processing, "publicly draw" shall mean a drawing which is conducted at a data processing center located in or out of the district, after reasonable public notice given in the district for which

juror names are being drawn, and which is open to the public at large under such supervision of the clerk or jury commission as the Judicial Conference of the United States shall by regulation require.

AMENDED PLAN OF THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA, ALL DIVISIONS,
FOR THE RANDOM SELECTION OF
GRAND AND PETIT JURORS

* * *

EXCUSES ON INDIVIDUAL REQUEST

This court finds and hereby states that jury service by members of the following occupational classes or groups of persons would entail undue hardships and extreme inconvenience to the members thereof, and serious obstruction and delay in the fair and impartial administration of justice, and that their excuse will not be inconsistent with the Act and may be claimed, if desired, and shall be granted by the court upon individual request: (1) all ministers of the gospel and members of religious orders actively so engaged; (2) all actively practicing attorneys,

physicians, dentists, and registered nurses; (3) any person who has served as a grand or petit juror in a federal court during the past two years immediately preceding his call to serve; (4) women who have legal custody of a child or children under the age of 10 years; (5) a person who is essential to the care of aged or infirm persons; and (6) all persons over 70 years of age at time of executing the jury qualification form.

EXEMPTION FROM JURY SERVICE

The court finds and hereby states that the exemption of the following occupational classes or groups of persons is in the public interest, not inconsistent with the Act, and shall be automatically granted: (1) member in active service of the armed forces of the United States; (2) members of the Fire or Police Departments of any State,

District, Territory, Possession or subdivision thereof: (3) public officers in the executive, legislative or judicial branches of the government of the United States or any State, District, Territory, or Possession or subdivision thereof who are actively engaged in the performance of official duties (public officer shall mean a person who is either elected to public office or who is directly appointed by a person elected to public office).

DETERMINATION OF QUALIFICATIONS, EXCUSES AND EXEMPTIONS

This plan hereby incorporates the provisions of 28 U.S.C.A., Section 1865, as amended (PI 92-269), which reads as follows:

> "(a) The chief judge of the district court, or such other district court judge as the plan may provide, on his initiative or upon the recommendation of the clerk. . ., shall determine solely on the basis of information

provided on the juror qualification form and other competent evidence whether a person is unqualified for, or exempt, or to be excused from jury service. The clerk shall enter such determination in the space provided on the juror qualification form and the alphabetical list of names drawn from the master jury wheel. If a person did not appear in response to a summons, such fact shall be noted on said list.

"(b) In making such determination the chief judge of the district court, or such other district court judge as the plan may provide, shall deem any person qualified to serve on grand and petit juries in the district court unless he--

"(1) is not a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district;

"(2) Is unable to read, write and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;

"(3) is unable to speak the English language;

"(4) is incapable, by reason of mental or physical

infirmity, to render satisfactory jury service; or

"(5) has a charge pending against him for the commission of, or has been convicted in a State or Federal Court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty."

QUALIFIED JURY WHEEL

The clerk shall also maintain separate qualified jury wheels or boxes, hereinafter referred to as qualified jury wheels for each division in the district and shall place in such wheel the names of all persons drawn at random from the master jury wheels and not disqualified, exempt, or excused pursuant to this plan. Each qualification form as called for by Section 1864, supra, shall bear the number which its addressee bears on the

voter list. The clerk shall insure that at all times at least 300 names are contained in each such qualified jury wheel. The qualified jury wheel in each division shall be emptied and refilled with names when the master jury wheel for that division is emptied and refilled.

DRAWING OF AND ASSIGNMENT TO JURY PANELS

From time to time the court or the clerk, if so ordered by the court, shall publicly draw at random from the qualified jury wheel or wheels such numbers of names of persons as may be required for assignment to grand or petit jury panels, and the clerk shall prepare a separate list of names of persons assigned to each grand and petit jury panel. These names may be disclosed by the clerk to parties and to the public after said list is prepared and the jurors have been summoned; provided,

however, the court may at any time or from time to time order generally, or with respect to any particular term or terms of court; that these names be kept confidential in any cases where in the court's judgment the interest of justice so requires. (28 U.S.C.A., Section 1863 (b)(8)(9).

USE OF ELECTRONIC DATA PROCESSING METHODS FOR JURY ADMINISTRATION

The judges of the Court find that in addition to the procedure outlined heretofore in this plan for the random selection of names of prospective jurors to serve on grand and petit juries from the voter registration lists of the counties comprising each division manually as well as the manual selection of names from master and qualified wheels electronic data processing methods can be advantageously used for selecting and copying names from the voter

registration lists of those larger counties that maintain these lists in machine readable forms such as punched cards, magnetic tapes, or magnetic discs. It is further found that in smaller counties currently maintaining their voter lists in handwritten or printed form it may be advantageous to employ a combination of methods whereby names are initially selected from the voter list manually and then recorded in punched cards, tapes or discs for subsequent handling and copying of these names by electronic machine methods.

Therefore, a properly programmed electronic data processing system or a combination system employing both manual and electronic machine methods may, at the Clerk's option and after consultation with the Chief Judge, be used to select names for the master wheel from voter registration lists, or lists

of actual voters, of any or all counties in the District, provided that the required proportions of names from each county are maintained.

Similarly, an electronic data processing system or a combination electronic and manual system may, at the option of the Clerk and the Chief Judge, be used to select names from the master wheel, and from the qualified wheel for summoning persons to serve as grand or petit jurors, and for the creation of any papers and records needed by the Court to administer the recruitment, selection, and payment of jurors.

If the Court elects to use electronic machine methods or a combination of manual and machine methods, in connection with any or all of the district's voter records, master jury wheels, or qualified jury wheels, the name selection system shall be

planned and programmed according to a "starting number" and "quotient" formula. This formula will insure that any group of names chosen will represent all segments of source files from which drawn and that the mathematical odds of any single name being picked are substantially equal.

The "quotient" is simply the number of names in the source list(s), or wheel, divided by the number of names wanted in any one drawing (in other words, it is the increment of names passed for each name taken). For example, if there are 200,000 names on county voter list(s), and questionnaires are to be sent to 4,000 of these names to establish the master wheel, the "quotient" for this drawing would be 50 (i.e., 200,000 divided by 4,000 = 50). Or, if there are 2,000 names in the qualified wheel and the court wishes to summon 100 jurors,

the "quotient" for this drawing would be 20 (i.e., 2,000 divided by 100 = 20).

The "starting number" is a number drawn by lot from a drum or box containing consecutively numbered cards covering the same range of numbers as the "quotient." For example, in the qualified wheel drawing mentioned above, the clerk would place consecutively numbered cards from one to twenty in a drum or box and draw one number. If the randomly picked number was "5", the computer would be programmed to pick the 5th name in the wheel first and then take every 20th name thereafter--i.e., the 25th, the 45th, etc.

Randomly drawing a "starting number" by lot accomplishes three objectives:

--- it establishes the location on the voter name list(s), or wheel, from which the first name is taken;

--- it removes the possibility of human discretion or choice in selection of any individual's name (making individual name selections unpredictable and unpredeterminable), and

--- it insures that, at the outset of the drawing, mathematical odds of being picked are substantially equal for all names in the source from which drawn.

PUBLIC ANNOUNCEMENT OF THE PLACE AND TIME WHEN AUTOMATED DRAWING OF NAMES WILL BE MADE

Random drawings of starting numbers shall be publicly made in the office of the Clerk of the Court at times to be publicly announced on the Court bulletin board.

Any drawing of names by automated selection methods shall be publicly made at the designated computer center. The location and approximate time of such

drawings shall be publicly announced on the Court's bulletin board and/or in another public place.

The office of the Clerk of the Court shall retain and, when requested, provide public access to the following documents:

--- the Court's "Juror Selection Plan," including a verbatim description of the method used in determining the "quotient" and "starting number,"

--- a verbal or graphically charted description of the procedure employed in the automated selection system, and

--- a copy of the Court's authorization and instruction order to the person or computer service organization which carries out automated name selection tasks for the Court.

GRAND JURIES

Inasmuch as our grand juries function on a district-wide basis they shall be drawn by the Court, or the clerk if so ordered by the Court, by drawing a pro rata, or approximately pro rata, number of names at random from the qualified jury wheels of each division in the district and the names so drawn shall be pooled and shall constitute the grand jurors to report for duty.

Opposition

Supreme Court, U.S.
FILED
MAR 22 1982
ALEXANDER L. STEVAS

Nos. 81-1380, 81-1405

In the Supreme Court of the United States

OCTOBER TERM, 1981

NORTHSIDE REALTY ASSOCIATES, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

BROWNING-FERRIS INDUSTRIES OF GEORGIA, INC.,
ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General

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QUESTION PRESENTED

Whether the court of appeals correctly found that various asserted errors in the selection of grand jurors were wholly immaterial in nature and thus did not give rise to a "substantial failure to comply" with the Jury Selection and Service Act of 1968.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

Nos. 81-1380, 81-1405

NORTHSIDE REALTY ASSOCIATES, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

BROWNING-FERRIS INDUSTRIES OF GEORGIA, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (81-1405 Pet. App. 86a-131a) is reported at 659 F.2d 590. The opinion of the district court (81-1405 Pet. App. 1a-85a) is reported at 510 F. Supp. 668.

JURISDICTION

The judgment of the court of appeals was entered October 19, 1981, and a timely petition for rehearing was denied (81-1405 Pet. App. 142a-143a) on December 2, 1981. The petitions for a writ of certiorari were filed on January 25, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant provisions of the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.*, are set forth at 81-1405 Pet. App. 144a-146a.

STATEMENT

These cases involve a challenge to grand jury selection procedures under the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.* There are three groups of petitioners, all of whom were indicted in the Northern District of Georgia in 1980: (1) the "real estate" petitioners (*i.e.*, the petitioners in No. 81-1380) were jointly indicted for antitrust violations; (2) the "garbage case" petitioners (*i.e.*, the first eight petitioners listed in No. 81-1405) were also jointly indicted for antitrust violations; and (3) two "individual" petitioners (*i.e.*, petitioners Bearden and Nixdorf in No. 81-1405) were indicted for various federal crimes. 81-1405 Pet. App. 93a.

After an exhaustive study of grand jury records and clerk's office practices, the real estate petitioners filed a motion to dismiss their indictments on the ground that they had been indicted by grand juries selected in violation of the Jury Selection and Service Act. 81-1405 Pet. App. 93a-94a. The garbage case and individual petitioners later filed similar motions to dismiss, relying on the claims of the real estate

petitioners. *Id.* at 94a. Proceedings on these motions were consolidated, and, after evidentiary hearings, the district court dismissed the indictments without prejudice. *Ibid.* The court found that the jury clerk had used improper methods for selecting a "starting number,"[1] failed to post adequate notice of her intention to select the starting number, granted certain exemptions or excusals incorrectly, disqualified certain eligible jurors, and granted permanent excuses to jurors who were entitled only to temporary excuses. *Id.* at 1a-85a; see *id.* at 110a. In the district court's view, these errors constituted a "substantial failure to comply" with the Act, within the meaning of 28 U.S.C. 1867(a), (d).

The court of appeals reversed and remanded the case to the district court. 81-1405 Pet. App. 86a-131a. The court of appeals held that the garbage case petitioners had failed to raise any of their claims within the time prescribed by the statute. *Id.* at 106a-110a. The court noted that it was "doubtful" whether the real estate petitioners had exercised "diligence in investigating and inquiring about the selection of starting numbers and the posting of notices" (*id.* at 105a), but, in the interest of "judicial efficiency," the court considered the merits of each of the claims raised by the real estate and individual petitioners. *Id.* at 105a-106a.

The court of appeals explained that no "substantial failure to comply" (28 U.S.C. 1867(d)) with the Act requiring dismissal of the indictments had been established by the essentially technical instances of noncompliance cited by the district court. The court

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[1] As the term suggests, a "starting number" is simply a number that determines where on the jury wheel the selection of jurors is to begin. See 81-1405 Pet. App. 97a-98a.

analyzed each of the alleged violations and concluded that none of them adversely affected the Act's objective, namely, to assure that grand jurors be randomly selected from a fair cross-section of the community on the basis of objective criteria and without any impermissible discrimination against individuals or groups. The errors with respect to the "starting number" had no significant effect on the randomness of the selections, and created no appreciable risk of any impermissible discrimination. The errors in interpreting or applying the objective criteria specified in the statute and the local plan made them no less objective and created no risk of impermissible discrimination; nor did these errors have any impact on the randomness of the selection procedure. Accordingly, though expressly disapproving the departures from the statutory and local plan provisions, the court of appeals concluded that there was no "substantial failure to comply" with the statute that would require dismissal of the defendants' indictments. *Id.* at 120a-131a.

ARGUMENT

Petitioners contend that Congress intended " 'procedural regularity' *alone* to be the test for compliance" with the Act (81-1405 Pet. 9 (emphasis in original); see also, *e.g.*, *id.* at 12, 17-18; 81-1380 Pet. 17, 24-25, 27), and that the errors in juror selection found by the district court here are "substantial" and require dismissal of their indictments. Whatever the merits of petitioners' contention, it is not ripe for review by this Court. The court of appeals' decision puts each of the petitioners in precisely the same position he would have occupied had the district court denied the motions to dismiss the indictments. If petitioners are acquitted following a trial on the merits, their

contentions will be moot. If, on the other hand, any of the petitioners is convicted, he will then be able to present his present contention to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the decision of the court of appeals would be premature at this time.[2]

In any event, the decision of the court of appeals, which involves an assessment of the facts of this particular case, is correct, and petitioners do not suggest that it conflicts with any decision of this Court or of any court of appeals. For this reason, even if the judgment of the court of appeals were not interlocutory, review by this Court would not be warranted.

Petitioners cannot seriously dispute the court of appeals' conclusion that, even taking into account all the "errors" cited by the district court, the grand jurors were selected "randomly," from a "fair cross section" of the community, pursuant to "objective criteria," and without discrimination based on race, color, religion, sex, national origin, or economic status. The errors with respect to the selection of a "starting number" were completely inconsequential.[3] Selecting the starting number by letting a book fall open to a particular page or by using the first number that comes to mind—as the jury clerk did—rather than by drawing the number from a box or drum—as prescribed in the local plan—is fully consistent with

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[2] In addition, as noted above, the garbage case petitioners failed to raise any of their claims within the time prescribed in 28 U.S.C. 1867(a).

[3] Use of a "starting number" in the selection of jurors is prescribed in the local plan, not by the statute.

the statute's "random" selection requirement.[4] Indeed, over a substantial period of time, the three methods would probably yield approximately the same results. See 81-1405 Pet. App. 113a. As the court of appeals found (*id.* at 115a-116a), the risk of any impermissible discrimination or other abuse created by the clerk's method of selecting the starting number was virtually "nonexistent."[5] For precisely the same reasons, the clerk's failure to give the requisite notice of her intention to select a starting number is of no consequence. Moreover, the selection of the starting number and of the jurors themselves was in fact conducted in a public place.

As the court of appeals observed (81-1405 Pet. App. 125a-127a), the erroneous excusals, exemptions, and disqualifications were both quantitatively and qualitatively insignificant. "The persons wrongfully excluded comprised only 1.2% of those screened by the clerk personnel, and only 1.6% of those placed on the qualified wheels" (*id.* at 125a). Moreover, the errors were (*id.* at 127a) "the result of * * * occasional misinterpretation or misapplication of technical statu-

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[4] As the court of appeals recognized (81-1405 Pet. App. 113a-114a), the statute does not require "randomness in the sense in which that term might be understood by statisticians." S. Rep. No. 891, 90th Cong., 1st Sess. 16 n.9 (1967); see generally H.R. Rep. No. 1076, 90th Cong., 2d Sess. 4 (1968). "It is sufficient for the purpose of this legislation if the plan adopts some system of selection that affords no room for impermissible discrimination against individuals or groups." S. Rep. No. 891, *supra*, at 16 n.9.

[5] The method for selecting the starting number obviously did not affect either the extent to which the pool of potential jurors reflected a fair cross section of the community or the objectivity of the criteria used to determine their qualifications.

tory criteria" rather than any intention to exclude any particular individuals or classes of individuals (*ibid.*).[6] There is no basis for assuming that the errors resulted in any disparate impact on any cognizable group; it is apparent, therefore, that the fair cross section requirement of the Act was not affected. The erroneous interpretation of objective criteria cannot reasonably be thought to constitute the impermissible use of subjective criteria. Similarly, the clerk's permanent excusal of individuals who were entitled only to temporary excusal is both quantitatively and qualitatively insignificant. At most, these errors involved .7% of those persons represented on the qualified wheels (81-1405 Pet. App. 130a), and there is no basis for assuming any disproportionate impact on any cognizable group (*ibid.*).

Thus, petitioners are forced to contend that although the statute explicitly provides that dismissal of an indictment is appropriate only if the court finds "a *substantial* failure to comply with the provisions" of the Act, Congress intended courts to dismiss indictments without regard to the significance of any noncompliance. There is nothing to commend such a

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[6] Contrary to petitioners' allegations (81-1405 Pet. 7, 16; 81-1380 Pet. 5), the clerk's office did not exclude persons over 70 on the ground that they "clog up the works." A number of persons over the age of 70 were included in the qualified wheels (Gov. Exh. 91). The jury clerk testified that the elderly took more of the time of the clerk's office, but she did not say that she therefore excused the elderly from jury service. See Tr. Vol. 4 at 842-858, 924-928, 1052-1055. The court of appeals agreed that the clerk's office did not use subjective criteria, and that errors concerning exclusion of those over 70 were the result of a misunderstanding by some clerk's office personnel that those over 70 would be excused without special request. See 81-1405 Pet. App. 122a.

reading of the statute; indeed, Congress explicitly noted that requiring proof of "substantial" noncompliance precluded relief for "harmless error" (S. Rep. No. 891, *supra*, at 34; H.R. Rep. No. 1076, *supra*, at 15). Contrary to petitioners' suggestion (81-1405 Pet. 17; 81-1380 Pet. 23-24, 28), Congress' failure to require proof of prejudice (compare S. Rep. No. 891, *supra*, at 34 with H.R. Rep. No. 1076, *supra*, at 16), does not indicate that insignificant violations of the Act should be deemed "substantial."[7] As we have explained, none of the errors in this case resulted in the use of "subjective" criteria for evaluating the jurors. Thus, petitioners' reliance (81-1405 Pet. 18; 81-1380 Pet. 18-19) on Congress' refusal to permit subjective criteria for determining the qualifications of jurors is entirely misplaced.[8]

The decision of the court of appeals is fully consistent with the terms and purposes of the Jury Selection

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[7] Petitioners' argument assumes that taking into account the significance of errors is tantamount to requiring a showing of prejudice. The two concepts are quite different. In this case, for example, if the violations had significantly affected the randomness of the selection process or significantly diminished the extent to which the pool of potential jurors represented a fair cross-section of the community, the court might have found the noncompliance "substantial" even though a properly selected grand jury surely would have indicted the petitioners and therefore they had suffered no prejudice. See, *e.g.*, *Taylor* v. *Louisiana*, 419 U.S. 522, 526 (1975); *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 225 (1946).

[8] The real estate petitioners (81-1380 Pet. 25-26) contend that violations of the Act will go unremedied unless indictments are dismissed for violations of the sort involved in this case. Dismissal of an indictment is a dubious deterrent for a jury clerk. More important, direct action by the courts to control the work of court employees is significantly more likely to produce the desired result than dismissal of indictments.

and Service Act. Petitioners' contrary interpretation would effectively amend the Act to eliminate an important safeguard: as Congress has written the Act, only a "substantial failure to comply" is a sufficient basis to dismiss an indictment.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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Amicus Brief

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No. 81-1380

IN THE

Supreme Court of the United States

October Term, 1981

NORTHSIDE REALTY ASSOCIATES, INC.; BARTON & LUDWIG, INC.; HARRY NORMAN & ASSOCIATES, INC.; CLOVER REALTY CO.; EDWIN A. ISAKSON; CHANDLER B. BARTON; and HARRY NORMAN, JR.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

No. 81-1405

BROWNING-FERRIS INDUSTRIES OF GEORGIA, INC.; GEORGIA WASTE SYSTEMS, INC.; SCA SERVICES OF GEORGIA, INC.; COMPLETE REFUSE REMOVAL, INC.; JAMES L. BAKER; RAYMOND E. DINKLE; CHARLES W. LANGELLO; ROY P. FOWLER, JR.; RICHARD BEARDEN; and FARRELL E. NIXDORF,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF GEORGIA AS AMICUS CURIAE SUPPORTING PETITIONS FOR CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Civil Liberties Union of Georgia hereby respectfully moves for leave to file the attached brief amicus curiae in this case.

The interest of amicus arises from its dedication to the preservation of civil rights, such as the right to serve on a jury, which is at issue in this case.

Respectfully submitted,

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF GEORGIA AS AMICUS CURIAE SUPPORTING PETITIONS FOR CERTIORARI

As an amicus curiae, the American Civil Liberties Union of Georgia respectfully urges this Court to grant the Petitions for Certiorari.

STATEMENT OF INTEREST

This case involves an abridgement of the civil right of jury service based on, among other things, a person's age. Amicus attempts to protect such civil rights as the right to serve on juries and perceives this highly-publicized case as an important test of that right.

SUMMARY OF ARGUMENT

As the Court has in the past, it should exercise its supervisory power to examine exclusion of a group of Americans from federal jury service.

ARGUMENT

As we read the record in this case, the District Court's chief jury clerk admitted during a long evidentiary hearing that she deliberately and intentionally disqualified elderly persons eligible for jury service because their service as jurors "clogs up the works" and "inhibits justice" (Record, Vol. 15, pp. 829-30) and because she assumed persons over age 70 "would request an excuse when they reported." United States v. Northside Realty Associates, Inc., 510 F. Supp. 668, 703 n.59 (1981). The court personnel also admitted to using "shaky" handwriting and nursing or retirement home addresses as disqualifying factors for old people, because they viewed those factors as signs of "mental infirmity." Id. at 701 n.49. As a result, the court personnel "purposely, and not inadvertently," unlawfully

disqualified over 46% of those persons over age 70 who should have had the opportunity to serve as jurors. Id. at 697 and n.42.

Such activities should not in our system of participatory democracy produce valid indictments.

Much of our Nation's judicial and political history has involved the civil right of a citizen to serve on a jury and the right of a citizen to be charged and tried by a properly constituted jury.

Although the origins of our jury system are shrouded in the Middle Ages, the idea of the persons of a community deciding the guilt or innocence of the community's members appears to reflect one of our Anglo-American tradition's most basic civilized instincts. See 1 Pollock & Maitland, History of English Law (2d Ed.) 137-45. (At least one

report of that development, incidentally, mentions an early instance of "older" citizens being assembled to comprise a jury: Thayer, The Jury and Its Development, 5 Harv. L. Rev. 249, 254-55 [1891].)

The framers of the constitutions of all of the original 13 states specifically included trial by jury (as have all subsequent states), and the Federal Constitution recognized the right to jury trial from its earliest drafts. In large measure, those early provisions reflected what this Court has called the "insistence upon community participation" in the judicial process. Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968). Viewed in that way, the civil right to serve on juries embodies part of the essence of our concept of a participatory democracy.

Accordingly, this Court has exercised its supervisory powers throughout our

Nation's history to review important cases where persons were excluded from jury service on the basis of improper criteria. E.g., Strauder v. West Virginia, 100 U.S. 303 (1880) (race); Hernandez v. Texas, 347 U.S. 475 (1954) (national origin); Thiel v. Southern Pacific Co., 328 U.S. 217, 222 (1946) (those "who worked for a daily wage").

"Senior" Americans comprise a large and growing portion of our country's population. Advances in medical science have dramatically extended the useful lives of Americans. Over the past ten years, the United States population of persons over age 70 has increased 120%. Compare 1980 Census of Population Supplementary Report No. PC80-S1-1 (April 1, 1980), with 1970 Census of Population, Characteristics of the Population, vol. 1, pt. 1 (April 1, 1970).

The applicable plan to implement the Jury Selection and Service Act of 1968 (the "Jury Service Act") recognized that citizens over 70 had an important contribution to make to the judicial system by allowing them the option to serve on juries if they wished.

The District Court, which heard the evidence in a lengthy hearing, found the intentional and systematic exclusion of those over 70 to violate that protection. This Court should grant certiorari to determine whether such deliberate exclusion of older Americans frustrates the goals of the Jury Service Act so significantly that indictments infected with such exclusions should be set aside without prejudice.

CONCLUSION

This Court should grant the petitions for certiorari in order to preserve the integrity of the federal jury system.

Respectfully submitted,

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